Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1994

PARKE-HAYDEN, INC.,

Petitioner,

vs.

LOEWS THEATRE MANAGEMENT CORP.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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103 pp

QUESTION PRESENTED FOR REVIEW

The District Court first found an employment contract between petitioner and respondent, then, expressing a personal bias against litigants such as petitioner, prevented the question of such contract from being specially submitted to the Jury, and thereupon abrogated the Jury's Verdict due, inter alia, to its own prior omission of the said question.

Did the District Court's abrogation of the Verdict violate petitioner's VIIth Amendment rights, when the Court's General Charge included the purportedly omitted Question, respondent's key employees admitted its employment of petitioner so as to procure its desired theater lease, and New York law authorized the Verdict due to respondent's subsequent arbitrary abrogation of the lease?

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REPORTS OF OPINIONS DELIVERED IN THE CASE

The District Court's April 20, 1992 opinion denying both parties summary judgment is reported at 789 F. Supp. 1257.

The District Court's opinion both denying respondent's motion to disqualify petitioner's trial attorneys and discussing the landlord mortgagee partnership agreement at times relied on respondent is reported at 794 F. Supp. 525.

The Court of Appeals' summary affirmance is reported at 22 F.3d 1091.

GROUNDS OF JURISDICTION

(i) The date of the entry of the judgment below sought to be reviewed is March 15, 1994.

(ii) The date of the order of the Court below denying petitioner's timely petition for rehearing is April 28, 1994.

(iii) The statutory provision believed by petitioner to confer on this Court jurisdiction to review the judgment below by writ of certiorari is 28 U.S.C. § 1254 (1).

U.S. CONSTITUTION, AMENDMENT VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner is a commercial real estate brokerage company, whose sole employees are Hy Teich and his brother. Petitioner's action for damages representing its lost broker's commission commenced on January 9, 1991. Jurisdiction in the District Court was predicated on 28 U.S.C. § 1332 (1988), petitioner being a New York corporation with its principal place of business in New York and respondent a wholly owned subsidiary of a

Delaware corporation with its principal place of business in New Jersey, the Delaware holding in turn being a wholly owned subsidiary of Sony Corporation, a Japanese concern, and the amount in controversy exceeding $50,000, exclusive of interest and costs.

Cross-motions for summary judgment resulted in an April 20, 1992 District Court Opinion explicitly determining that respondent "employed" petitioner to acquire a lease at or near the intersection of Broadway and 72nd Street in Manhattan for a planned new theater complex; and that petitioner thereafter materially aided respondent not only in locating the lease site but in starting negotiations with the property's landlord and in moving them forward in the precise manner desired by respondent prior to the ultimate preparation of a final lease.

The District Court's central legal determination in its April 20, 1992 decision read:

> "In New York, absent an agreement to the contrary, a real estate broker earns his commission when he procures a buyer who is ready, willing and able to purchase at the terms set by the seller . . . The affidavits and deposition testimony . . . leave no doubt that, under relevant New York law, Loews employed Teich to procure a lease of the 72nd Street Property by soliciting and accepting his services on Loews' behalf". 789 F. Supp. 1257, at 1263. (emphasis added).

This ruling received immediate and prominent coverage in the Wall Street Journal*, and moreover has since been cited with approval by the Second Circuit Court of Appeals. U.S. v. Miller, 997 F.2d 1010, 1023 (2nd Cir. 1993).

Nevertheless, the District Court denied petitioner's motion for summary judgment, finding the terms of its agency

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*See Judge Sticks Buyer With Broker's Fee, Wall St. J., April 28, 1992, at B8, col. 1.

contract with respondent, i.e., as producing a "deal . . . palatable . . . to both parties" "too indeterminate to form a basis upon which to conclude . . . a motion for summary judgment." 789 F. Supp. at 1263-64 and Note 2. The Court further determined that despite the parties' agreement on all of the terms as determined in their final lease, respondent's access to results from rock borings and asbestos tests under the site might conceivably have constituted a condition precedent to its signing the lease, which condition was further communicated to the Owner. Id., at 1264-65.

At trial respondent's site selector Gil Littman testified that on his first day of work in December 1987, he called "about 88 brokers that I have been dealing with for many years" to carry into effect respondent's intent to acquire theater

sites in both Manhattan and its suburbs. Littman testified in this regard: "Working with brokers is a normal part of your job. When you want to get a site the normal way to do that is to get a broker who knows the area." One of the 88 brokers contacted by Littman was petitioner. (J.A. 48, 50).*

According to Littman, petitioner at this time was instrumental in developing for respondent's consideration additional theater sites on Long Island and in Brooklyn; Danbury, Connecticut; Shrewsbury, Massachusetts; and Tinton Falls, New Jersey (J.A. 53-58), and in the same time period acquired for respondent a further site at Third Avenue and 11th Street in Manhattan.

Subsequent to petitioner's Third Avenue and 11th Street acquisition, the president of respondent's then corporate

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*"J.A." references are to the "Joint Appendix Pursuant to F. R. App. P. 30" filed by petitioner in the Court below.

parent, Columbia Pictures Entertainment, Inc., Lew Korman, informed Littman that Columbia strongly desired that respondent acquire a further site at the Broadway and 72nd Street intersection in Manhattan. Korman's reasons for his interest in this intersection included respondent's possession of a successful functioning theater complex twelve blocks north, at Broadway and 84th Street, and the crucial paradox that the Broadway and 72nd Street intersection, despite being "perhaps the biggest trading area in the city" had "no real theater". (J.A. 51). Littman thereupon contacted three brokers to this end, among them petitioner.

According to Littman, Teich thereafter took Littman, Littman's "construction man, George McNeill and Jack Held, an architect" to the Beacon Theater, at 74th and Broadway. There, Littman testified: "We all loved the site, great location, perfect for a theater, but the

city has it landmarked so you can't do anything with it". As the parties exited the Beacon, Littman testified:

> "A. [W]e headed south towards 72nd. We came to 72nd and Broadway[.] Teich pointed to the building on 72nd and Broadway, the southwest corner, and said, '[H]ow would you like that for a theater?' I immediately looked at him and I recall the exact words I told him. I said, '[B]oy, you are hired, get me that site.' That is exactly what I told him". (J.A. 60).

Littman testified that he thereafter reported to Korman: "Teich is on it and it's owned by his friend Phil [Pilevsky, general partner of the property's owner, Broadway-72 Associates] and he got instructions to get it." Korman then responded, Littman testified, by saying "the same thing, 'get it.'" (J.A. 61).

Teich thereafter reported back to Littman that Pilevsky had no interest whatsoever in leasing the site to respondent, because he was making "more money" with his existing commercial

tenants. (J.A. 62). Littman relayed Pilevsky's categorical rejection to Korman, who then, according to Littman, once again insisted that petitioner procure the site for respondent. Littman thus testified:

> "A. . . . He [Korman] said, ['G]et Teich, bust his horns, do what you have to do. Get the location'. I in turn got back to Teich. I never forget, I called him 12[:00] at night to make sure he was home. I said, '[B]oy, we want the site. You do what you have to do. I will meet with you and Phil. Get the location". (J.A. 63).

Littman some time thereafter received a telephone call from the landlord, Pilevsky, inviting Littman to a meeting with himself and Teich in order to discuss a letter received from Korman, further urging Pilevsky to lease the site to respondent. In the course of this meeting, Littman testified:

> "A. Pilevsky took the [Korman] letter, tore it up and threw it away.
> Q. What did Mr. Teich do?

> A. He went berserk. He grabbed him. He said, '[W]hat, are you crazy? I want that for Littman for Loews' theater.' I never saw Teich that way. He flipped out and he went after Phil[,] in a friendly way[,] of course." (J.A. 63-64).

Littman further testified that Teich did more than locating the site and 'going after' its owner, his friend Pilevsky. Under the direct instructions of respondent's former President and Chief Operating Officer, Jerry Esbin, Teich further acted as respondent's exclusive agent in gaining Pilevsky's assent to respondent's essential lease terms. Littman testified in this regard:

> "Q. What role, if any, did you ask Mr. Teich to play to help Loews in connection with those negotiations?
> A. Well, start them and any time we had anything to negotiate further or get a lower rent we would get Teich to handle it.
> Q. Who was it who would get Teich to handle it?
> A. Esbin would get him to handle it. I would get him to handle it. Esbin would tell me, I would tell Teich.
> Q. Give us an example of something that Mr. Esbin asked

you to get Mr. Teich to do in terms of the deal that Mr. Esbin asked you to get to Teich to.
A. I think he wanted the rent lowered. So I told Teich to get it lowered, and he got it lowered.
Q. Did Mr. Teich respond to your request?
A. Yes.
Q. And he --
A. He flipped out and got it lowered." (J.A. 64-65).

Esbin's testimony was in complete accord with Littman's on this point. At the outset of his cross-examination Esbin thus graphically described the avidity with which he, too, coveted Broadway and 72nd Street as a possible theater site for Loews. In response to respondent's trial attorney's question "[W]hat did [Mr. Littman] tell you [with respect to] . . . the 72nd Street transaction" Esbin thus replied:

"He [Littman] said there is a great location on 72nd and Broadway to put up a theater, and right off the bat I started to salivate because if I had the money I would have put it up myself." (Esbin trial transcript, at 438).

Esbin further testified that if respondent: "had a problem with the agreement or if we found something lacking that Loews wanted probably to get a better advantage, I would talk to Hy Teich or [respondent's vice president for real estate] Ken Benjamin. I would tell Ken Benjamin to talk to Hy Teich at times and he would, and at times I would talk to Hy Teich to try to resolve certain problems."(Esbin trial transcript, at 406-07). Esbin estimated that Teich "went to Pilevsky . . . on about 80 percent of the time I needed to get something done". (id., at 408).

Esbin included among the "things" that Teich accomplished for him both the reduction of a year's rent on the property and a delay in any rent increase from the fifth to the eleventh year of the lease. With respect to the rent, Esbin testified: "[W]e were at loggerheads. So I called in Teich and I said, '[Y]ou better get this

straightened out . . . The rent is too high now and it will just be impossible.' Hy Teich went back to Pilevsky and we then had a meeting with Pilevsky and it was agreed . . . that the increase will be in the eleventh year". (id., at 409)

Esbin concluded his discussion of respondent's two-year employment of petitioner by observing (id., at 409-10):

> ". . . I would say he was performing services not only for Loews but really for himself because if these things didn't work the deal would have been gone. I couldn't live with a deal in certain ways. So Hy Teich worked for me to get my deal done and at the same time he was working for himself to get his deal done. . . . He had a role for himself and by my asking him what to do, he was very prominent in getting things done for myself. Personally I don't think I could have got some these things done going head to head at the beginning with Phil Pilevsky".

Between January and March 1990, respondent's and Pilevsky's attorneys prepared and exchanged comments on

succeeding drafts of the proposed lease, all of which drafts and comments, with respondent's evident knowledge and consent, were communicated to petitioner. (J.A. 215, 216-27, 234-36, 243). Respondent's parent, Columbia, also approved the lease. (J.A. 228, 242). Petitioner separately agreed with Pilevsky, who in accord with customary New York real estate practice was expected by all parties to pay petitioner's commission on the deal as landlord (J.A. 59), on a figure of $792,553.00, based on respondent's agreement to pay $1,100,000 monthly in rent. (J.A. 207).

The parties thereafter completed a final lease dated April 6, 1990, and projected a May 1, 1990 closing date, without stipulating in any way that time was of the essence. (J.A. 99-202; 247). The final lease further included an Article 35, in which respondent and Pilevsky identified petitioner as the sole

broker with whom any "conversations or prior negotiations were had" by them in connection with the lease and further agreeing to hold each other harmless from any "claims for brokerage commissions" made by any other "broker or finder". (J.A. 179).

The final lease's May 1, 1990 closing was aborted by a change in respondent's corporate ownership. Sony Corporation having acquired respondent's parent, Columbia, in or about September 1989, Sony thereupon replaced Korman. In or about the end of April 1990, contemporaneously with the parties' preparation of the final lease, Columbia's new management installed Alan Friedberg as respondent's chief executive. Friedberg stated in an April 16, 1990 letter to respondent's General Counsel, Seymour H. Smith, which letter was shown to the Jury, that he killed the Broadway and 72nd Street deal negotiated by Littman, Esbin,

Korman and petitioner due to his personal opposition to several of the essential lease terms already agreed on between respondent and landlord Pilevsky. (J.A. 68-69, 203-06); see also 789 F. Supp. at 1261.

Subsequent to petitioner's resting of its trial case, respondent's attorney presented the District Court with a two-part Fed. R. Civ. P. 50 (a) (1) motion, the first branch of which asserted that "at the time Loews decided not to proceed with the lease" the evidence was insufficient to show that the property's mortgagee had consented to it, as required by the Pilevsky partnership agreement (J.A. 276-77)* and the second branch of

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*Beyond the fact that Friedberg's above-referenced April 16, 1993 letter to Smith made it very clear that the presence or absence of the mortgagee's consent was perfectly irrelevant to Loews' decision to abort the deal (J.A. 205), petitioner's trial attorney reminded the District Court that it had found in its second opinion in this action that the partnership's escrow

Footnote continued

which resuscitated the "indeterminate terms" theory appearing in the Court's April 20, 1992 summary judgment decision, namely, that "the Petitioners have failed to prove an agreement that existed between respondent and the petitioner in this case which was of sufficient definiteness to be enforceable under the laws of New York". (J.A. 278).

Despite Teich's attorney's clear rejoinder to this argument that the amount of Teich's broker's commission was not only totally irrelevant to the Teich-Loews agency agreement but in addition had been definitely "reasonably certain" and "agreed upon", in this particular instance between Pilevsky and petitioner,* the

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agreement stipulated a never-attained May 31, 1990 deadline for the mortgagee's consent. (J.A. 37, 279; 794 F. Supp. 525, 528).

*Teich's attorney further explained petitioner's theory of legal recovery to the District Court, stating: "There is no need that it be a term of an agreement as to the financial terms of it between Loews

Footnote continued

District Court reacted to respondent's motion by demonstrating a callous indifference to its constitutional duty clearly to delineate the legal boundaries of petitioner's claim.

Thus, while denying respondent's dismissal motion under the correct theory that petitioner's performance of its "employment" by respondent earned it its commission due to respondent's backing out of the lease at the last moment, the District Court, resuscitating once again the "indefinite terms" objections voiced in its April 20, 1992 summary judgment opinion, nevertheless purported to "dismiss" petitioner's "contract claim", on the erroneous ground that petitioner's employment at the outset lacked the preliminary precision thought by the

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and the broker because indeed Loews was not supposed to pay the broker except at the end by backing out of the deal." (J.A. 281) (emphasis added).

District Court to be a prerequisite to the existence vel non of any "agreement" at all.

The Court thus stated:

> "My conclusion with respect to the motion is yes and no. There is not enough evidence in this record to establish terms and conditions of an agreement between Loews and Parke-Hayden with respect to the amounts or time of payment. At least those two conditions are certainly not clear.
>
> So a contract claim on behalf of Parke-Hayden against respondent is dismissed.
>
> However, as I understand the law, and I may be wrong about this and I would be pleased to be corrected at some other time, in the event there is an agreement between the parties on all the essential terms and agreement, even though it is not executed and therefore not an enforceable agreement under the statute of frauds, if the buyer or in this case the lessee frustrates the agreement, the frustrator, in this case the lessee, can be held liable for the fee.
>
> In other words, the broker has earned his fee and is not going to be deprived of the fee in the event that the . . . . lessee determines he is not going to go forward in the face of a completed agreement." (J.A. 285-86) (emphasis added).

Further pressed thereafter by respondent's trial attorney to elucidate his reasoning respecting its denial of respondent's motion, the District Judge reiterated *not only* its above-quoted deliberate indifference to petitioner's basis for recovery but an evident personal bias against litigants happening to exercise petitioner's particular profession.*

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*See April 28, 1993 proceedings (J.A. 296-97, 299) (Court proclaims: "[T]his is an area of the law which I am frank to tell you I think is extremely confusing and results from the courts cooking up a claim to protect brokers. Why the courts see the necessity to do this is absolutely beyond me. . . . This is the length of the Chancellor's foot which, in my opinion, has gone to about a yard and I don't really see a basis for it. . . . Parenthetically, no sense wasting time on it, but what has created this problem is the peculiarity of the real estate profession where the broker is serving two masters and is paid by one. Anybody who has rented an apartment or bought a house is very familiar with the bind in which the innocent – and maybe Loews isn't so innocent – but the innocent purchaser finds himself when they are exposed to

Footnote continued

The Court thereafter on May 3, 1993 sent the case to the jury with the following five Special Interrogatories authorized by Fed. R. Civ. P. 49:

> "Did Parke-Hayden, Inc. ("Parke-Hayden") have an agreement with [the landlord partnership] Broadway 72 Associates to be paid a brokerage commission in connection with the execution of a lease to respondent Theater Management Corp. ("Loews") of a portion of the property owned by Broadway 72

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brokers who manage to get something each way no matter what. Anyhow, Mr. Teich is relying on New York cases which I can't get around".) (emphasis added); April 28, 1993 proceedings (J.A. 300-01) (Court opines that potential quantum meruit basis for recovery – put forward by petitioner's trial attorneys in evident desperation at the Court's above-quoted "dismissal" of petitioner's "contract claim" – "doesn't go to the jury at all because it's an equity claim", stating: "I don't see how it goes to the jury so I can just quietly deep sixth [sic] it as far as the jury is concerned and then get to it in my own time" thereupon querying counsel: "I don't see it as a jury case, do you?"); April 30, 1993 proceedings (J.A. 314) (addressing potential implied contract basis for recovery, Court states: "Implied contract by definition, it seems to me, means you can't find a contract on the facts.")

Associates at Broadway and 72nd Street (the lease)?

Was Broadway 72 Associates ready, willing, and able to enter into the lease?

Did Loews have a valid reason not to proceed with the execution of the lease?

Did Loews act in bad faith, wrongfully or arbitrarily in not proceeding with the execution of the lease?

What damages, if any, to which Parke-Hayden is entitled as a result of the conduct of Loews?" (J.A. 353-54).

The District Court's General Charge supplemented the Special Interrogatories by reinforcing in several ways the idea that respondent need be found to be fully satisfied with the lease terms acquired for it by petitioner, as said terms were communicated to petitioner by Littman and Esbin. Thus the Instructions at numerous points stated that respondent had to be found to have "benefited" from, was "satisfied" with, got "the deal it wanted to get" and achieved its own "essential terms" in the terms procured by petitioner

on its behalf. (J.A. 320, 323, 325, 326, 329, 331, 332).

Under the heading "Loews' Wrongful, Arbitrary Conduct or Bad Faith Acts", the Instructions in fact concisely stated the essence of petitioner's legal claim against respondent:

> "The question is whether there was a deliberate attempt in bad faith to cause the failure of negotiations. A party who has engaged the broker to procure an agreement cannot, after negotiating terms to the point that completion of the transaction is imminent, then change his mind and willfully prevent a final agreement." (J.A. 330).

The Jury on May 3, 1993 answered the Court's Special Interrogatories and General Charge by finding respondent liable to petitioner for $792,553.00, the full amount of his broker's commission initially agreed upon with Pilevsky. (J.A. 355-56, 207).

Respondent on May 19, 1993, prior to the entry of Judgment on the Jury's

verdict, renewed its prior Fed. R. Civ. P. 50 motion, joining with it motions for a stay of enforcement of the Verdict and for a new trial. Respondent's motion argued at great length the same "indeterminate terms" theory respecting the Teich-Loews agency contract appearing in both the District Court's summary judgment opinion and its denial of respondent's Rule 50 motion. It further asserted, without any additional elaboration – and indeed without explaining in any manner whether it was referring to alleged the lack of mortgagee consent, raised by respondent's trial attorney on April 27, 1993, or, on the other hand, to the year-old issue of asbestos tests, surfacing in the District Court's summary judgment opinion but completely omitted by respondent's attorney on April 27, 1993 – "[T]he landlord was not, at any time, ready, willing and able to execute and deliver a

lease to respondent (see Special Verdict Form ¶ 2)".*

The District Court thereafter on July 24, 1993, without entering Judgment on the Jury's verdict, issued an Opinion and Order dismissing petitioner's Complaint, or in the alternative (for the identical reasons) granting a new trial, pursuant to respondent's motion. (J.A. 357-80). The Court's opinion (see Appendix hereto) is a discursive one, whose central apparent point concerns the Court's deliberate failure specially to submit to the Jury the Question of respondent's "contract" with petitioner. (see pages 3 and 6-7 thereof). The Court's opinion further enunciated certain flatly erroneous findings of law and fact

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*Respondent additionally asserted, similarly without any further elaboration or explanation: "[T]here was no valid, enforceable contract between petitioner and Broadway-72 Associates as required by the Court's instructions (see Special Verdict Form ¶ 1)".

directly contradicting its April 20, 1992 summary judgment opinion, discussed under "Reasons for Granting the Writ", below.

REASONS FOR GRANTING THE WRIT

Justice Holmes declared in Aikens v. State of Wisconsin, 195 U.S. 194, 25 S.Ct. 3, 6 (1904) (quoted in Wilkerson v. McCarthy, 336 U.S. 53, 63, 69 S.Ct. 418 (1949)): "But it must be assumed that the constitutional tribunal does its duty, and finds facts only because they are proved." The callous indifference to "the constitutional tribunal" manifested by the Article III District Court Judge herein, i.e., successively to his own decision earlier in this same litigation, to the Verdict of the Jury following his own Instructions, and – in arbitrarily and capriciously overturning the Verdict, to the decisions of this Court and the Court of Appeals – reveals an abuse of the

judicial power of the United States so blatant and cynical as to cry out for this Court's exercise of its supervisory power. The Court of Appeals' affirmance, solely on the basis of what it chose to call "Judge Sweet's thorough and well-reasoned opinion below" clearly "sanction[s]" the District Court's abuse herein of its noble constitutional role, within the meaning of Rule 10 .1. (a) of this Court.

Here, a published opinion of the United States District Court for the Southern District of New York, prominently displayed in the nation's leading commercial news service and followed thereafter as guiding jurisprudence in the leading federal Circuit, has now been directly contradicted, by *the same District Court initially authoring the opinion*. Moreover, this Court delights in proclaiming before litigants such as petitioner not only that they manage to "get something each way" but that he "may

be wrong about [the law governing their claims]" and "would be pleased to be corrected at some other time".

Here, that "some other time" occurred after the Court had sent the case to the Jury under Special Interrogatories well supporting its ensuing Verdict. The District Court had this case right the first time; its feverish attempt to undo the Verdict produced by its Interrogatories and General Instructions cannot stand against this Court's power to enforce "the accepted and usual course of judicial proceedings".

Blatant Legal and Factual Error
In Court's Decision

The District Court's July 24, 1993 opinion rests on the following clearly erroneous conclusions of law and fact, all of them flatly contradicting the same court's April 20, 1992 summary judgment opinion:

(i) The parties having been prevented by respondent from executing their final lease of April 6, 1990, the District Court on this basis erroneously concluded: "This fee-shifting of the broker's commission [sought by petitioner herein] has occurred only in cases where the transaction actually closed . . . if the transaction does not close for whatever reason, the broker can recover only from the party which employed him." (J.A. 368).

(ii) Flatly ignoring the testimony of Littman and Esbin (as well as Teich and Pilevsky) conclusively demonstrating respondent's solicitation and two-year use of petitioner's services, the Court's opinion further purported to find as a fact: "Although Loews requested Parke-Hayden to locate properties in

which it might be interested, Loews never requested that Parke-Hayden act as its broker in connection with the potential lease transactions." (J.A. 376).*

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*The District Court's opinion further reiterated at length its essential error respecting petitioner's broker's fee, surfacing both in its April 20, 1992 summary judgment opinion and in its April 27, 1993 response to respondent's initial Rule 50 motion, i.e.: "Testimony at trial indicated that Parke-Hayden had never agreed on the amount of its fee with respondent . . . ". (J.A. 373; see also J.A. 375). As fully recognized in the District Court's April 20, 1992 summary judgment opinion, petitioner's claim against respondent was grounded not in contract but in the "fee-shifting" cases erroneously distinguished by the District Court – as of July 24, 1993 – as requiring a formal closing between the principals. Moreover, with respect to the Court's "indefinite terms" confusion, clear New York authorities reveal that a broker, as common understanding would suggest, may earn his commission by negotiating a deal whose terms are *not yet in existence*. Lane-The Real Estate Department Store, Inc., 28 N.Y.2d 36, 319 N.Y.S.2d 836, 838 (1971) (dictum); Kaelin v. Warner, 27 N.Y.2d 352, 318 N.Y.S.2d 294 (1971); Charles H. Coppard, Inc. v. Chesbro, 34 A.D.2d 879, 312 N.Y.S.2d 444, 445 (4th Dept. 1970) (agreement to find client "a home of our desire"); Arnold v.

Footnote continued

Clear "Fee Shifting" Rule of New York Law

As set out in the District Court's own April 20, 1992 summary judgment opinion, authoritative New York decisions stretching back into the nineteenth century impose liability for a real estate broker's lost commission on a principal who after employing the broker unjustifiably aborts a fully consummated deal subsequently achieved by him, despite the fact that the commission was to be paid by the other contracting principal, and further despite the lack of any written "contract" between the broker and the principal thus found liable. Westhill Exports, Ltd. v. Pope, 12 N.Y.2d 491, 496, 240 N.Y.S.2d 961, 964 (1963); Schaechter v. Regency Properties, Inc., 115 A.D.2d 981, 497 N.Y.S.2d 793 (4th Dept. 1985); Duross Co. v. Evans, 22 A.D.2d 573, 574,

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Schmeidler, 144 App. Div. 408, 129 N.Y.S.2d 408 (1st Dept. 1911).

257 N.Y.S.2d 674, 676-77 (1st Dept. 1965); McKnight v. McGuire, 117 Misc. 306, 191 N.Y.S. 323, 324 (1st Dept. Appellate Term 1921) (defining the lost commission as the broker's consequential damages, fully foreseeable to the aborting principal); compare Lane-The Real Estate Department Store, Inc. v. Lawlet Corp., 28 N.Y.2d 36, 319 N.Y.S.2d 836, 838 (1971) (broker earns commission despite landlord's subsequent conveyance of property prior to closing, or due to failure of any condition for which his principal is responsible).

The District Court's opinion relies principally on Grossman v. Herman, 266 N.Y. 249, 253, 194 N.E. 694, 695 (1934); and Julien J. Studley, Inc. v. New York News, Inc., 122 A.D.2d 633, 505 N.Y.S.2d 419 (1st Dept. 1986), both of which are completely inapposite to the case at bar.

Thus, in Grossman, a broker employed by the owner of real property repeatedly solicited a buyer before gaining the

buyer's assent to an oral proposition to purchase the property, formulated by the broker. The owner thereupon gave an "oral acceptance" of the proposition relayed back to him by the broker. In exculpating the buyer from its purchase contract, the court stressed the parties' failure to agree on any of the conveyance's essential terms. 194 N.E. at 695.

In Studley, the broker learned from an unsolicited approach to the owner that its property was for sale, but also that no asking price had yet been determined. The broker later returned to the owner with an offer specifying a 3% commission for itself, but without further specifying who would pay it. The court held that the owner had never employed the broker. 505 N.Y.S.2d at 420.

Relying on Grossman and Studley, the Court's central legal determination in its opinion is that "This fee-shifting of the broker's commission has occurred only in

cases where the transaction actually closed" (J.A. 368; 379). This conclusion, however, directly contravenes governing New York law, as set out in the Court's April 20, 1992 summary judgment opinion. See Lane-The Real Estate Department Store, Inc., supra, 28 N.Y.2d at 42, 319 N.Y.S.2d at 840-41 ("[I]t is a well-settled rule in this State that in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission when he produces a buyer who is ready, willing and able to purchase at the terms set by the seller. . . . The parties are, of course, free to provide otherwise by agreement. For example, they can condition the seller's liability on the closing of title . . . ").

Blatant Violation of Seventh Amendment

This Court has regularly reinstated jury verdicts illicitly overturned by both the District and Circuit Courts on arbitrary and insufficient bases. This Court thus stated in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 1409 (see also Note 6 thereto):

> "The Court of Appeals, was, of course, bound to view the evidence in the light most favorable to Continental [the party against whom the Court of Appeals directed a judgment] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn".

Accord: Webb v. Illinois Central R.R., 352 U.S. 512, 77 S.Ct. 451 (1957); Rogers v. Missouri P. R.R., 352 U.S. 500, 77 S.Ct. 459 (1957); Wilkerson v. McCarthy, supra; Galloway v. United

States, 319 U.S. 372, 63 S.Ct. 1077 (1943).

The Second Circuit follows the identical rule. See, e.g., Sirota v. Silitron Devices, Inc., 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838 (1982); Konok v. Champlain Valley Physicians Hosp., 733 F.2d 1007 (2nd Cir.), cert. denied, 469 U.S. 884, 104 S. Ct. 253 (1984); Fortunato v. Ford Motor Co., 464 F.2d 962 (2nd Cir. 1972), cert. denied, 409 U.S. 1038, 93 S. Ct. 517 (1972);. see also, e.g., Kinnell v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958 (3d Cir. 1988); see generally 5A Moore's Federal Practice, ¶ 50.02 [1] at 50-33-35.

CONCLUSION

Petitioner respectfully concludes that the District Court's conduct herein justifies the issuance of this Court's writ pursuant to both Rule 10 .1. (a) and .1. (c). The Judgment and Order under review should be reversed in all respects and the Jury's May 3, 1993 Verdict awarding petitioner the full amount of its lost $792,553.00 commission in damages against respondent, plus interest, reinstated by this Court.

Dated: New York, New York
July 25, 1994

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 28, 1994

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April one thousand nine hundred and ninety-four.

DOCKET No. 93-7864

Parke-Hayden, Inc.

Plaintiffs-Appellants,

vs.

Loews Theatre Management Corp.,

Defendant-Appellee.

A petition for rehearing having been filed herein by Plaintiff-Appellant Parke-Hayden, Inc. in the above entitled matters,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

FOR THE COURT
GEORGE LANGE
By: s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of March, one thousand, nine hundred and ninety-four.

Present:

Honorable John M. Walker, Jr.,
Honorable Dennis G. Jacobs,
Circuit Judges,

Honorable Richard Owen,*
District Judge.

No. 93-7864

PARKE-HAYDEN, INC.,
Plaintiff-Appellant,

v.

LOEWS THEATRE MANAGEMENT CORP.,
Defendant-Appellee.

ORDER

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* The Honorable Richard Owen, United States District Judge for the Southern District of New York, sitting by designation.

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of New York (Sweet, *J.*) and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

The plaintiff Parke-Hayden, Inc. appeals from the district court's order entering judgment as a matter of law in favor of defendant Loews Theatre Management Corp. following a jury trial.

We have carefully considered the issues presented by the parties, and we affirm the district court's judgment for substantially the reasons stated in Judge Sweet's thorough and well-reasoned opinion below. *See Parke-Hayden, Inc. v. Loews Theatre Management Corp.*, No. 91 Civ. 0215 (RWS), 1993 U.S. Dist. LEXIS 10318 (S.D.N.Y. July 24, 1993).

Accordingly, judgment of the district court is affirmed.

s/ John M. Walker, Jr.
Hon. John M. Walker, Jr., U.S.C.J.

s/ Dennis G. Jacobs
Hon. Dennis G. Jacobs, U.S.C.J.

s/ Richard Owen
Hon. Richard Owen, U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 24, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 0215 (RWS)

PARKE-HAYDEN, INC.,

Plaintiff,

- against -

LOEWS THEATRE MANAGEMENT CORP.,

Defendant.

OPINION

APPEARANCES:

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Of Counsel

Appendix C

Sweet, D.J.

Defendant Loews Theater Management Corp. ("Loews") has renewed its motion submitted at the close of trial for judgment as a matter of law pursuant to Rule 50(b), Fed. R. Civ. P., or, in the alternate, for a new trial pursuant to Rule 59, Fed. R. Civ. P. and a stay of the enforcement of judgment pursuant to Rule 62 (b), Fed. R. Civ. P.

For the reasons given below, the motion for judgment as a matter of law pursuant to Rule 50(b) is granted.

Parties

Loews is a Delaware corporation with its principal place of business in Secaucus, New Jersey. Loews' parent company at all relevant times was Columbia Pictures Entertainment, Inc. ("Columbia Pictures"). Loews engages in the operation and management of movie theaters throughout the United States through its own subsidiary and affiliated corporations.

Parke-Hayden, Inc. ("Parke-Hayden") is a licensed New York real estate broker with its principal place of business in Great Neck, New York.

Broadway-72 Associates ("Broadway-72") is a New York partnership which was seeking to lease property located at 72nd Street and Broadway in New York City (the "72nd Street Property") to Loews upon the understanding that Loews would construct and operate a partially below-grade movie theater complex.

Appendix C

Prior Proceedings

After Parke-Hayden brought suit, both parties moved for summary judgment. Loews alleged that it was under no obligation to the broker in the absence of an express or implied contract of employment with the broker and in the absence of a signed and executed lease. This Court found that Parke-Hayden had alleged sufficient evidence of a contract between Parke-Hayden and Loews to allow the case to go to trial. *See Parke-Hayden Inc. v. Loews Theatre Management Corp.*, 789 F. Supp. 1257 (S.D.N.Y. 1992), familiarity with which is assumed.

The case went to trial on April 20, 1993. At the close of the plaintiff's case, prior to presenting its defense, Loews moved for judgment as a matter of law, again alleging that Parke-Hayden had failed to demonstrate an enforceable contract either with Parke-Hayden or with Broadway-72 and that, in the absence of either contract, Loews owed no obligation to the broker. The motion was granted in part and denied in part. On April 27, 1993, the court ruled from the bench that although Parke-Hayden had failed to allege all the necessary elements of an express contract,[1] the jury could still find that Loews liable if it found all of the following elements:

> First, Parke-Hayden must establish that it was employed as a broker by Broadway-72 Associates. Second, ParkeHayden must prove that it performed the services required by its brokerage agreement, and that Loews benefited by its services. Third, it must prove

1. The court in granting the motion to dismiss the contract claim referred generally to "contract." All the cases relied upon by Loews in its motion papers were examples of express contracts, usually written option riders on other agreements.

> that Loews and Broadway-72 Associates had a meeting of the minds on all essential terms of the agreement. Fourth, it must prove the Loews broke off the transactions wrongfully, arbitrarily and in bad faith.

The jury returned a verdict for Parke-Hayden via special verdict which did not ask whether the jury had found an employment agreement between Parke-Hayden and Loews.

Facts

The facts set forth below were established during the trial and are not presently in contention.

Sometime in early 1988, Hy Teich ("Teich"), the president of Parke-Hayden, brought the 72nd Street Property to the attention of Loews's employee, Gil Littman ("Littman"), who had been hired by Loews in December 1987 to locate potential theater sites for Loews. Loews, Parke-Hayden, and the New York real estate developer Philip Pilevsky ("Pilevsky") began negotiations in 1988 about Loews' purchase of two properties partly owned by Pilevsky: one located at Third Avenue and Eleventh Street in Manhattan and the other the 72nd Street Property. Loews' sublease of the property at Third Avenue and Eleventh Street was ultimately executed, and Pilevsky paid Teich a brokerage fee in connection with this sublease.

Negotiations for the 72nd street lasted for almost two years. Teich alleges that in the course of negotiations his efforts led to agreements between the parties on several key points. By about March 1990, Loews and Broadway-72 had reached agreements on term, rent, taxes, construction of the theater, options for additional

years, air rights, changes in zoning and mortgages, and other matters. Several drafts of the lease agreement were drawn up, although Parke-Hayden alleges that the last represents a "final" draft agreement. All provided that Parke-Hayden was the sole broker or finder and that Broadway-72 would pay Parke-Hayden its brokerage commission for the lease transaction. No lease agreement was ever signed or executed.

Because the theater complex was to be partially below-grade, demolition of the existing building and construction of a new facility would be necessary. Loews contended at trial that it had always conditioned its signing of the lease upon satisfactory results from soil and environmental tests at the 72nd Street Property. Physical due diligence conducted at the request of Loews revealed the presence of bedrock and asbestos. The estimated cost of excavation through bedrock would increase the cost of the project by $800,000 to $1,000,000. Loews' officials informed Pilevsky that it was concerned about bearing the one million dollar cost of excavation and asbestos removal and inquired about possible concessions from Broadway-72.

Meanwhile, in September 1989, Columbia had been taken over by Sony Corporation, at which time certain of the Loews executives who had been dealing with Teich and Parke-Hayden left and were replaced by new management. Loews' new management refused to sign the draft lease agreement and terminated the lease negotiations. Parke-Hayden then brought suit against Loews, alleging that since it had provided Loews with a "ready, willing, and able" seller according to the terms initially set by Loews, it had performed its duties as a broker and was still entitled to its commission.

Appendix C

Discussion

Judgment as Matter of Law

In reviewing a jury's verdict, "the judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not," *Berevino v. Saydjari,* 574 F.2d 676, 684 (2d Cir. 1978). Where a jury verdict imposes liability, and the applicable law does not impose liability under the factual circumstances established at trial, such a miscarriage of justice occurs and a motion for judgment as a matter of law should be granted.

Loews maintains that instructing the jury to determine whether Loews bargained in good faith without first finding either an express or an implied contract of employment as a matter of law between Loews and Parke-Hayden misinstructed the jury. In reviewing a claim that the jury was erroneously instructed, a court will determine whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues. The court should grant judgment as a matter of law if the charge creates substantial and ineradicable doubt about whether the jury has been properly guided in its deliberations. *Pierce v. Ramsey Winch Co.,* 753 F.2d 416, 425 (5th Cir. 1985) (citations omitted). In this case, it was error to instruct the jury to determine Loews' good faith without first determining, as a matter of law, the source of such an obligation to Parke-Hayden.

Duty to Bargain in Good Faith

Traditional principles of Anglo-American common law grounded a duty of good faith-only in some form of obligation either incurred by the parties or else imposed by law. Absent fraud,

misrepresentation, concealment, and duress, parties negotiation for a contract are dealing at arm's length and therefore have no duty to act in good faith. "A duty to negotiate in good faith arises only when there is a binding agreement between the parties . . . or a binding agreement to negotiate," *Ogden Martin Systems, Inc. v. Tri-Continental Leasing Corp.*, 734 F. Supp. 1057, 1071 (S.D.N.Y. 1990) (Sweet, J.), citing *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984), *cert. denied*, 469 U.S. 828 (1985) and *Teachers Ins. and Annuity Ass'n v. Tribune Co.*, 670 F.Supp. 491, 498 (S.D.N.Y. 1987)). The reason for the failure of the negotiations is "immaterial absent the threshold finding of whether there was any sort of binding obligation," *Ogden*, 734 F. Supp. at 1071.

New York law still adheres to the common law doctrine of caveat emptor in real estate negotiations, *London v. Courduff*, 141 A.D.2d 803, 529 N.Y.S.2d 874, 875 (2d Dep't 1988). The lack of a duty to bargain in good faith has been considered part of the definition of freedom of contract:

> In a business transaction both sides presumably try to get the best of the deal. This is the essence of bargaining and the free market. And in the context of this case, no legal rule bounds the run of business interest. So one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for "bad faith" in negotiations.

Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1223 (7th Cir. 1988). Contract and compulsion, in this view, are antithetical

notions, for there can be no obligation to contract except on the terms agreed upon. Freedom of contract has its corollary in the "policy of certainty," or definiteness, under which the terms of an agreement to be enforceable should be so certain that parties know precisely what to rely on and courts can determine when performance of breach has occurred and what the precise remedy should be. *See generally* Friedrich Kessler and Edith Fine, *Culpa in Contrahend,. Bargaining in Good Faith, and Freedom of Contract: A Comparative Study,* 77 Harv. L. Rev. 401, 409 (1964) (comparing common law contract to contracts under the civil law).

The Law of Real Estate Brokers in New York

"[I]t is a well-settled rule in this State that in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission when he produces a buyer who is ready, willing and able to purchase at the terms set by the seller," *Lane-The Real Estate Department Store, Inc. v. Lawlet Corp.,* 28 N.Y.2d 36, 42; 268 N.E.2d 635; 319 N.Y.S.2d 836, 840 (1971); *Kalmon Dolgin Affiliates, Inc. v. Estate of Nutman,* 172 A.D.2d 917, 568 N.Y.S.2d 204 (3d Dep't 1991). *Lane* speaks of a "ready, willing, and able buyer" because the broker is typically employed by the seller. It is undisputed that all parties interested in the 72nd Street Transaction contemplated that Broadway-72 would pay Parke-Hayden's commission, as memorialized in each draft of the proposed lease agreement. However, provided the parties to the underlying contract close the transaction, the courts have allowed the broker to recover his fee from the buyer even if he was originally employed by the seller. In *Gronich & Co. v. 649 Broadway Equities Co.,* 169 A.D.2d 600, 565 N.Y.S.2d 18 (lst Dep't 1991), the lessee was held to the broker's commission when the lease was executed and the lessor would not pay:

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> [I]t cannot be assumed that a broker works gratuitously and the lessor and lessee are held to such knowledge when they accept the result of the broker's services . . . . when the seller and buyer have agreed upon terms and execute a lease agreement, the broker's work is done and he has earned a commission.

Gronich at 601. *See also Hecht v. Meller,* 23 N.Y.2d 301, 244 N.E.2d 77, 296 N.Y.S.2d 561 (1968) (either seller or buyer must be liable for broker's fee after contract of sale is executed despite buyer's justified later recession due to destruction of property).

This fee-shifting of the broker's commission has occurred only in cases where the transaction actually closed, however; if the transaction does not close for whatever reason, the broker can recover only from the party which employed him.

> The question of law is reduced to this proposition: Is a prospective purchaser liable for commissions to a broker employed by the owner when the prospective purchaser fails to carry out an oral acceptance of an offer made by that broker? There can be no such liability unless the prospect employed the broker . . . If the broker is not employed, he takes his chances in respect to a consummation of pending negotiations and unless he definitely brings the parties together to such an extent that the prospective purchaser is bound, his services are rendered without right to compensation. Otherwise, every conditional offer or tentative acceptance by a prospect would result in a contract of employment.

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Grossman v. Herman, 266 N.Y. 249, 253, 194 N.E. 694 (1935). If the buyer employs the broker, the law of New York provides for a buyer who breaches a written contract of sale to pay the broker even in a contract where the seller was responsible for the broker's compensation.

> It is the general rule that a prospective purchaser of real estate is not liable for failure to accept an offer unless it appears that the broker was employed by the purchaser. *Niesen v. Galewski,* 211 App. Div. 858, 207 N.Y.S. 885, *aff'd* 240 N.Y. 652, 148 N.E. 744) . . . . However, where there is a contract of employment between the purchaser and broker, the breach thereof on the part of the purchaser results in the latter's liability for damages. (*Parker v. Simon,* 231 N.Y. 503, 507-08, 132 N.E. 404, 405).

Duross Co. v. Evans, 22 A.D.2d 573, 257 N.Y.S.2d 674, 676 (lst Dep't 1965).

> Absent express exclusion of the broker's rights, where a buyer employs a broker who procures an agreement which the buyer fails or refuses to perform, the buyer is liable for the commission the broker would have earned if the agreement had been executed.

Schaechter v. Regency Properties Inc., 115 A.D.2d 981, 497 N.Y.S.2d 793, 794 (4th Dep't 1985) (citations omitted).

> We start with the proposition that where there

> is a contract of employment between the purchaser and the broker which does not expressly exclude the broker's right to commission unless the purchaser actually enters into a contract of sale, the purchaser's refusal to contract with the seller willing to contract on the purchaser's terms makes the purchaser liable to the broker for the commission the broker would have received from the seller.

Tulp v. Padula, 70 Misc. 2d 306, 333 N.Y.S.2d 3, 6 (Civ. Ct., Bronx Cty., 1972) (citations omitted).

Employment by the buyer is required for the broker to recover from the buyer. However, employment by the seller does not prevent the broker from being employed by the buyer as well. The mere fact that Parke-Hayden was to receive its commission from and thus was employed by Broadway-72, does not prevent it from also being employed by Loews. *See Grossman,* 266 N.Y. at 251-52 (1935); *Long Island Bus. Exch., Inc. v. DeLuca,* 58 A.D.2d 594, 594, 395 N.Y.S.2d 244, 246 (2d Dep't 1977); *Simon v. Allied Chem. Corp.,* 35 A.D.2d 273, 275, 278 N.E.2d 340, 315 N.Y.S.2d 919, 922 (lst Dep't 1970), *aff'd,* 29 N.Y.2d 861, 328 N.Y.S.2d 169 (1971); *Pease & Elliman,* 216 A.D. 421, 423, 215 N.Y.S. 346 (lst Dep't 1926) (quoting *McKnight,* 117 Misc. 306, 308, 191 N.Y.S. 323). The question is whether the facts may be held as matter of law to justify an inference of double employment, *Grossman,* 266 N.Y. at 252, especially when either or both such contracts of employment may be express or implied.

There are three types of contract at common law: express, implied-in-fact, and quantum meruit or implied-in-law. An express

contract requires the classic "meeting of the minds": the parties must have reached a fundamental agreement on every substantive term, and the terms must be sufficiently definite and certain to be enforceable. An implied-in-fact contract is one where the parties have assented to the contract, but the assent is inferred from their course of dealing, not from any explicit statement; the parties' intentions are implied from the facts of the case. Quantum meruit, by contrast, is a form of quasi-contract claim where payment for services is sought in the absence of any contract or understanding between the parties.

Express Contract

A buyer may be liable to a broker under an express contract even if that contract depend upon an unfilled condition. In *Nuvest, S.A. v. Gulf & Western Ind. Inc.*, 649 F.2d 943 (2d Cir. 1981), Gulf and Western executed a finder's fee contract for a coal company with a broker, Nuvest, under which Nuvest would not be paid unless Gulf and Western actually acquired the type of interest specified in the contract. Although Gulf and Western never acquired such an interest, the court found that Gulf and Western had deliberately prevented an acquisition and therefore awarded Nuvest five percent of the price (as provided in Nuvest's contract) which the buyer and seller would have agreed upon in their final transaction. According to the express terms of the Gulf & Western-Nuvest contract, Gulf & Western owed Nuvest nothing until the deal was closed, but the existence of an express contract with the buyer created a duty either to bargain with the seller in good faith or to pay the broker. This is in accordance with New York law, and represents nothing more than the proposition that a party cannot prevent liability under a contract by refusing to perform because of an unfilled condition whose fulfillment rests entirely in the power of that party:

> It should be observed, however, that even where the broker and seller expressly provide that there shall be no right to a commission unless some condition is fulfilled, and the condition is not performed, the seller will nevertheless be liable if he is responsible for the failure to perform the condition.

Nuvest, 649 F.2d at 947, quoting *Lane*, 28 N.Y. at 43, 319 N.Y.S.2d at 841.

However, a buyer may not be liable to a broker under an express contract if the contract between the buyer and the broker actually fails for want of an essential term:

> If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract... The doctrine of definiteness serves two related purposes.
>
> *First*, unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy .... *Second*, the requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement.

Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 74 N.Y.2d 475, 482, 548 N.Y.S.2d 203, 923 (1989) (citations omitted), *cert. denied* 498 U.S. 816, 111 S.Ct. 58, 112 L.Ed.2d 33 (1990). Parke-Hayden's express contract of employment by Loews

failed here because at least one essential term was indefinite. At trial, Parke-Hayden failed to establish that Loews and Parke-Hayden had agreed upon any terms of compensation:

> As price is an essential ingredient of every contract for the rendering of services, an agreement must be definite as to compensation. . . . Where no fee is stated, courts may not calculate a fee without custom and usage evidence to establish an extrinsic standard which is "fixed and invariable" in the industry in question. . . . As no objective method or formula was provided for determining a commission . . . [the agreement] was unenforceable.

Cooper Square Realty, Inc. v. A.R.S. Management, Ltd., 181 A.D.2d 551, 581 N.Y.S.2d 50, 51 (lst Dep't 1992) (real estate broker's alleged brokerage agreement insufficient for want of rate of compensation). Under New York law, custom and usage evidence must establish that the omitted term is "fixed and invariable" in the industry in question, *Hutner v. Greene*, 734 F.2d 896, 898 (2d Cir. 1984) (plaintiff's evidence that Lehman formula was only frequently, not invariably, used for calculating compensation made finder's agreement insufficient).

Testimony at trial indicated that Parke-Hayden had never agreed on the amount of its fee with Loews and that there was no fixed and invariable rate scale in New York city for real estate transactions of this type. Absent a definite agreement on Parke-Hayden's commission, there was no express contract.

Appendix C

Implied-in-fact Contract

Any implied-in-fact contract also fails on the same ground. Although brokers have recovered under implied contracts, Parke-Hayden has not alleged a course of dealing sufficient to infer an implied contract sufficiently definite as a matter of law. In *Schaechter,* the buyer breached a contract to purchase real property and was held liable for a fee to his broker:

> [W]here a buyer employs a broker who procures an agreement which the buyer fails or refuses to perform, the buyer is liable for the commissions the broker would have earned if the agreement had been executed . . . . This is true even where the contract or the usual practice contemplates that the seller will pay the commissions . . . and where there is only an implied contract of employment between the buyer and the broker and the buyer has not expressly undertaken to pay commissions.

Schaechter, 497 N.Y.S.2d at 794.

> This theory of a broker's 'implied' employment was recognized by the Court of Appeals as early as 1881, when in *Sibbald v. Bethlehem Iron Co.* (83 N.Y. 378, 380-381) it stated: 'the contract of employment may be established . . . by facts showing, in the absence of [an] express agreement, a conscious appropriation of the labors of the broker.'

Gronich, 169 A.2d at 602, 20. "Although the assent of a person to

be charged under an implied contract is necessary, a person may conduct himself in such a manner that his assent may fairly be inferred." *Gurney, Becker & Bourne v. Benderson Dev. Co.* 62 A.D.2d 1165, 404 N.Y.S.2d 203, 204 (4th dep't 1978), *rev'd on other grounds,* 47 N.Y.2d 995, 394 N.E.2d 282, 420 N.Y.2d 212 (1979) (error to submit issue of account stated to jury); *Miller v. Schloss,* 218 N.Y. 400, 113 N.E. 337 (1916).

> It is clearly settled that before a broker can collect his commissions, he must have been employed by his principal. Such employment may be express or implied. If express, it may be either written or oral. If implied, the facts surrounding employment must establish that the broker was indeed employed to perform the services performed. . . . Brokers who rely upon verbal or implied contracts of employment do so at their own peril.

Black v. Vaeth, 55 Misc. 2d 502, 504; 285 N.Y.S.2d 557, 561 (City Ct. Utica Cty. 1967).

> The one class [of implied contract] consists of those contract which are evidenced by the acts of the parties and not by their verbal or written words — true contracts which rest upon an implied promise in fact. . . . A contract cannot be implied in fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged; or where there is an express contract covering the subject matter involved; or against the intention or understanding of the parties,

Miller, at 406-07, 113 N.E. at 339. The failure of the parties to establish the amount of Parke-Hayden's compensation to be paid by Loews can be considered to be a fact inconsistent with the existence of an implied contract. Implied-in-facts contracts are "true contracts" which must be at least definite enough to be enforceable. Such liability lies in contract, and therefore if the court is unable to ascertain the terms of the contract, it cannot enforce an inferred contract for the reasons stated in *Cobble Hill, supra.* At least one case indicates that an implied promise must be as definite on the essential term of compensation as an explicit promise. *See Towers v. Doroshaw,* 5 Misc. 2d 241, 159 N.Y.S.2d 367, 378 (Sup. Ct. Onondaga Cty. 1957). Although courts will often use a standard of reasonableness in implying these terms, the absence of a fixed and definite term of compensation here makes it unreasonable to imply a brokerage fee.

Even if that is not the case, however, Parke-Hayden did not allege at trial a course of dealing from which terms of an employment contract with Loews could be inferred. All drafts of the lease contemplated that the broker would be paid by the seller. In *Julien J. Studley, Inc. v. New York News Inc.,* 122 A.D.2d 633, 505 N.Y.S.2d 419, 421 (lst Dep't 1986), *aff'd,* 518 N.Y.S.2d 749 (1987), the court held that where the parties agreed in writing that the purchaser, as opposed to the defendant seller, was to pay the plaintiff's commission, "[t]he legal effect of this documentary evidence is to negate any implication of employment" between the plaintiff and the defendant. Although there was no agreement in writing in this case, evidence that the draft lease indicated the lessor was to pay the fee is also a fact inconsistent with the implied contract.

An implied contract of employment by the buyer may exist where the seller will pay the fee, as it did in *Schaechter.* However,

in that case the general course of dealing between the parties made it clear that the broker was working for the buyer. Here, there was no such indications. Although Loews requested Parke-Hayden to locate properties in which lt might be interested, Loews never requested that Parke-Hayden act as its broker in connection with the potential lease transactions. Acceptance of terms communicated by the broker does not automatically lead to the inference that both sides employed the broker. *See Grossman v. Herman,* 266 N.Y. at 253.

Quantum Meruit

Parke-Hayden has also asserted a separate claim under the second type of implied contract, which is referred to as a contract implied-by-law or quantum meruit. "There are two classes of implied contracts, those implied in fact as a result of the acts of the parties . . . and quasi or constructive contracts resting upon equitable principles." *Adams & Co. Real Estate, Inc. v. E. & B. Super Markets, Inc.,* 26 A.D.2d 365, 366, 274 N.Y.S.2d 776, 778 (lst Dep't 1966). "This procedural term . . . is sometimes used inexactly as a synonym for the more general term quasi-contract, which refers to any money claim for the redress of unjust enrichment." Alan Farnsworth, *Contracts* § 2.20 (1982). Because payment is sought for services rendered in the absence of any contract, a benefit conferred on the other party, or unjust enrichment, is an essential element of a quantum meruit of other quasi-contract claim. *Sven Salen AB v. Jacq. Pierot Jr. & Sons Inc.,* 559 F. Supp. 503, 506 (S.D.N.Y. 1983), *aff'd,* 738 F.2d 419 (1984).

> A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth, it is not a contract

> or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain.

Miller, 218 N.Y. at 407, 113 N.E. at 339. A benefit must be conferred upon the defendant under circumstances where allowing the defendant to retain the benefit was unjust. *Reprosystem B.V. v. SCM Corp.*, 727 F.2d at 263; *Indyk v. Habib Bank, Ltd.*, 694 F.2d 54, 57 (2d Cir. 1982); *Marcraft Recreation Corp. v. Frances Devlin Co.*, 459 F. Supp. 195, 197 (S.D.N.Y. 1978); *Bradkin v. Leverton,* 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192, 196 (1970).

Here, even the fact that the broker may have worked diligently for a two-year period is not relevant unless Loews received a benefit from such work. Because a benefit in a real estate transaction can only be incurred when the property is bought or leased, a broker's claim for quantum meruit becomes cognizable only when and if a lease arises. *In re C.H. Stuart Inc.*, 16 B.R. 296, 297-98 (W.D.N.Y. 1981). In general, where a party provides services seeking to achieve a specific result to benefit another, the party cannot recover unless those services bring about that particular result. *See Martin H. Bauman Assoc., Inc. v. H. & M Int'l Transport, Inc.*, 171 A.D.2d 479, 567 N.Y.S.2d 404 (lst Dep't 1991) (failure to recruit candidates who were hired resulted in no benefit conferred); *Reisner v. Recco Temporary Services, Inc.*, 136 A.D.2d 686, 524 N.Y.S.2d 102 (2d Dep't 1988) (failure to generate new business); *Adams & Co. Real Estate, Inc. v. E&B Super Markets Inc.*, 26 A.D.2d 365, 274 N.Y.S.2d 776 (lst Dep't 1966) (failure of leasing efforts); *Towers,* 159 N.Y.S.2d at 379 (same): *cf.*

Gronich, 169 A.D.2d at 602 (real estate broker entitled to fee from purchaser absent employment agreement where lease was executed).

In short, in every case in which liability has been established against a party in favor of a broker, the broker was employed by the party from whom it was seeking compensation. The plaintiff's case here does not match, on its facts, any of the cases cited above where the broker has collected from the buyer. *United States v. Burger,* 717 F. Supp. 245, 251 (S.D.N.Y. 1989) (JNOV motion granted in civil tax case where court was "unable to find a single case" finding the defendant liable under factual circumstances similar to those established at trial). For this reason, defendant's motion is granted.

Conclusion

Loews' motion for judgment as a matter of law is granted and the complaint of Parke-Hayden is dismissed. In the event Parke-Hayden appeals from this decision and is successful, a new trial is warranted, and therefore Loews' motions for a new trial pursuant to Rule 59, Fed. R. Civ. P., and for a stay of the enforcement of the judgment pursuant to Rule 62(b), Fed. R. Civ. P. will be granted for the reasons given above. *See Carvel Corp. v. Diversified Management Group, Inc.,* 930 F.2d 228, 232 (2d Cir. 1991) (new trial warranted when trial court issues jury instructions that give jury misleading impression or inadequate understanding of law).

It is so ordered.

New York, N. Y.
July 24 , 1993

s/ Robert W. Sweet
Robert W. Sweet
U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 27, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. 0215 (RWS)

PARKE-HAYDEN, INC.,

Plaintiff,

- against -

LOEWS THEATRE MANAGEMENT CORP.,

Defendant.

APPEARANCES:

DAVIS & GILBERT
Attorney for Plaintiff
1740 Broadway
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Of Counsel

Appendix D

OPINION

Sweet, D. J.

Defendant Loews Theatre Management Corp. ("Loews") has moved by order to show cause for an order pursuant to DR 5-102(B) of the Disciplinary Rules of the Code of Professional Responsibility ("DR 5-102(B)"), 22 N.Y.C.R.R. § 1200.21, disqualifying the firm of Davis & Gilbert from representing plaintiff Parke-Hayden, Inc. ("Parke-Hayden").

The facts of this case have been discussed in detail in a prior opinion of this court, familiarity with which is assumed. *See Parke-Hayden, Inc. v. Loews Theatre Mgt. Corp.*, __ F. Supp. __ No. 91 Civ. 0215 (S.D.N.Y. Apr. 20, 1992) (the "Opinion").

On June 1, 1992, Loews moved by order to show cause for an order, among other things compelling the deposition of Robert P. Reichman ("Reichman"). Reichman is an attorney at Davis & Gilbert who provided legal services to Broadway-72 Associates (the Owner), prior to becoming associated with Davis & Gilbert. In a bench ruling on June 9, 1992, this court granted Loews's application to the extent of ordering Reichman's deposition. After conducting Reichman's deposition, Loews brought the present motion by order to show cause on July 15, 1992. The motion was made returnable on July 21, 1992, at which time oral argument was heard and the motion considered fully submitted.

By this action, Parke-Hayden seeks to obtain from Loews a brokerage commission relating to a proposed lease between Loews and the Owner on the grounds that it was impliedly employed by Loews to procure the lease. At the time the proposed lease was being negotiated, Reichman, then a member of the firm of Dreyer

& Traub, represented the Owner in the negotiations. Although Loews has characterized Reichman as the Owner's "principal negotiator" the prominence of his role has not been established by fact. It uncontested, however, that Reichman was privy to conversations between Loews and the Owner and had many conversations himself with Loews representatives regarding the proposed lease. In response to interrogatories, Parke-Hayden has identified Reichman as one of four people having knowledge of facts material to this case.

Sometime after the events at issue in this litigation, Reichman left Dreyer & Traub and joined Davis & Gilbert.

Referring to the Opinion, Loews characterizes the "case dispositive issues at trial" to include (l) the terms of the lease to which Loews supposedly agreed; (2) whether the Owner was ready, willing and able to meet Loews's terms; and (3) whether Loews had the right to perform physical tests on the Property, as defined in the opinion, to assure no adverse rock or asbestos condition existed prior to obligating itself to the lease. Loews maintains that, as "chief negotiator" for the Owner in connection with the transaction, Reichman is the only non-party witness who can testify as to facts relevant to these issues. Moreover, based on Reichman's deposition and various documents submitted as exhibits to Loews's motion, Loews maintains that his testimony may be prejudicial to Parke-Hayden.

Loews's motion to disqualify Davis & Gilbert is based on DR 5-102(B), which provides that:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a

> lawyer in his firm may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

Loews argues that this rule mandates Davis & Gilbert's withdrawal because Reichman, a lawyer in the firm of Davis & Gilbert, "may" be called as a defense witness and because his testimony "is or may be prejudicial" to Parke-Hayden.

In view of the potential for use as a tactical device, motions to disqualify are subject to "fairly strict scrutiny, particularly motions under subdivision (B) [of DR 5-102]." *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989). Although a literal reading of DR 5-102(B) mandates disqualification merely on the showing that the potential testimony of a witness-advocate *may* be prejudicial to the party his firm represents, under New York law the party seeking disqualification must demonstrate that it is likely that the " 'testimony to be given by the witness is necessary' " and that it is substantially likely to be prejudicial to the party represented by his firm. *Luk Lamellen U. Kupplungsbau GmbH v. Lerner*, 167 A.D.2d 451, 452-53, 562 N.Y.S.2d 134 (2d Dep't 1990) (quoting *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 515 N.Y.S.2d 735 (1987)), *see also, e.g., Plotkin v. Interco Dev. Corp.*, 137 A.D.2d 671, 524 N.Y.S.2d 763 (2d Dep't 1988); *In re Estate of Bartoli*, 137 Misc.2d 499, 521 N.Y.S.2d 392 (Surr. Ct. Nassau County 1987), *aff'd*, 143 A.D.2d 830, 533 N.Y.S.2d 324 (2d Dep't 1988); *L-S Plate & Wire Corp. v. Federal Ins. Co.*, N. 88 Civ. 0706, slip op. at 4 (S.D.N.Y. Mar. 28, 1989) (movant must demonstrate genuine necessity for testimony and substantial

prejudice); *Rice v. Baron,* 456 F. Supp. 1361, 1371 (S.D.N.Y. 1978) (movant bears burden of establishing existence of factors warranting disqualification).

In determining the "necessity" of the testimony, a court should consider such factors as the significance of the matter, the weight of the testimony and the availability of other evidence. *S & S Hotel Ventures Ltd. Partnership,* 69 N.Y.2d at 446. For testimony to be "prejudicial" under the rule,

> the "projected testimony of a lawyer or firm member must be sufficiently adverse to the factual assertions or account of events offered on behalf of the client such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." Furthermore, the moving party "bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring is substantial."

Rice, 456 F. Supp. at 1371 (citations omitted), *quoted in Lamborn,* 873 F.2d at 531.

Loews first maintains that Reichman's testimony as to certain consents from the Owner's mortgagee and limited partners may be prejudicial to Parke-Hayden because it will demonstrate that the owner was not "ready, willing and able" to enter into the lease as of April 17, 1990. According to Loews, these consents were necessary to allow the Owner to enter into the lease. Reichman testified that it was his understanding that, absent these consents:

> [t]here would be no transaction I presume. And the reason I say I presume is because I think there was also a possibility that, and I don't recall the general partners getting into this fact, the consent was not required but they determined to go ahead and get the consent anyway.

Reichman further testified that, as of April 17, 1990, the consents were not obtained.

Reichman also testified about the substance of a proposed escrow agreement between the Owner and Loews. According to ¶ 5 of that agreement, the effect of a failure to obtain the consents by May 31, 1991 was to render the lease of no further force and effect. *See* Danzig Aff. Ex. C. ¶ 5. The escrow agreement also states that:

> WHEREAS, as of the date hereof, Landlord has not yet obtained the consent of [the Mortgagee] . . . and the consent of the Limited Partners and, as a result, Landlord may not at this time convey a leasehold interest in the Premises to [Loews]. . . .

See id.

Although Reichman's testimony relates to a material element of Parke-Hayden's case, namely, whether the Owner was "able" to convey a leasehold interest to Loews, there is insufficient information before the court at this time to determine whether the testimony is likely to prejudice Parke-Hayden and whether it is "necessary" for purposes of disqualification. It is unclear, for

instance, whether the Owner's failure to obtain consents from its mortgagee and limited partners would actually impair its power of alienation or whether it would simply put Loews into default under agreements with those parties. Moreover, the magical quality of the date April 17, 1990 has not been established. The escrow agreement plainly states the operative date to be May 31, 1990. Finally, any inconsistency between Reichman's testimony and Teich's testimony that consents had been obtained is not "sufficiently adverse to the factual assertions or account of events offered on behalf of the client such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." Assuming that Teich is an appropriate witness on this subject in the first place, he testified that he did not know what date the approvals were obtained and that he was unaware if the approvals were written or oral. Teich's testimony suggests that his understanding of consents was a mere oral sign-off and that he was not commenting on contractual formalities. *See* Danzig Aff. Ex. D at 136-37 ("He [Pilevsky] got in touch . . . with all his limited partners and it was agreed.").

Furthermore, Loews has not demonstrated that Reichman's testimony is "necessary" for purposes of disqualification under DR 5-102(B). First, Reichman's testimony as to the substance of the escrow agreement is unnecessary because "other evidence" is available, not the least of which is the agreement itself. *See Kirshon, Shron, Cornell & Teitelbaum P.C. v. Savarese,* 581 N.Y.S.2d 487 (App. Div. 3d Dep't 1992) (testimony not "necessary" where cumulative of other evidence); *see also Lamborn,* 873 F.2d at 532 (not disturbing district court finding that testimony on certain issue would have been cumulative and therefore not grounds for disqualification). Second, Loews has not established that Reichman is the sole witness capable of testifying as to when the consents were or were not obtained. Presumably, the

Owner's principals involved in the transaction would have this knowledge at their disposal. However, Loews brought this motion prior to the scheduled depositions of those individuals, thus rendering it impossible to determine the necessity of Reichman's testimony. Because Reichman's testimony as to the consents issue may prove to be merely cumulative, it is not appropriate to disqualify Davis & Gilbert on this basis at this time. *See id.* (disqualification premature where discovery has not been had).

Loews next argues that Reichman's testimony will be prejudicial to Parke-Hayden because it indicates Parke-Hayden's awareness that favorable rock and asbestos test results were a condition precedent to Loews entering into the lease. Loews's assertion is unsupported by any of its factual submissions on this motion. These submissions establish nothing more than that Parke-Hayden was aware that Loews was interested in conducting tests at the Premises before the commencement of the term of the lease. However, neither Reichman's deposition testimony or the documentary exhibits to Loews's papers evidence an awareness that these tests were a condition to Loews entering into the lease. The evidence simply does not support Loews's conclusory assertion that "Mr. Reichman knew full well that Loews needed to determine whether there was a rock problem before it could agree to sign a lease." Loews Memo. at 13.

Finally, Loews argues that Reichman's testimony will be prejudicial because it conflicts with Teich's testimony as to his awareness (or lack thereof) of the projected cost of asbestos and rock removal and as to his discussions (or lack thereof) of conversations regarding the rock issue after April 20, 1992. However, given the questionable materiality of the underlying evidence, any such contradictions have not been shown to be sufficiently adverse to the Owner at this time to warrant disqualification.

Appendix D

For the foregoing reasons, Loews motion to disqualify Davis & Gilbert from representing Parke-Hayden is denied.

It is so ordered.

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N.Y.
July 27, 1992

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISRICT OF NEW YORK DATED APRIL 20, 1992

United States District Court,
S.D. New York.

April 20, 1992

No. 91 Civ. 0215 (RWS)

PARKE-HAYDEN, INC.,

Plaintiff,

v.

LOEWS THEATRE MANAGEMENT CORP.,

Defendant.

* * *

Davis & Gilbert, New York City (Bruce Ginsberg, of counsel), for plaintiff.

Marks Murase & White, New York City (Douglas J. Danzig, of counsel), for defendant.

Appendix E

OPINION

SWEET, District Judge.

Plaintiff Parke-Hayden, Inc. ("Parke-Hayden") has moved pursuant to Fed. R.Civ.P. 56 for an order granting summary judgment in its favor on the First Claim contained in the complaint. Defendant Loews Theatre Management Corp. ("Loews") has also moved for partial summary judgment in its favor dismissing the Third and Fourth Claims of the complaint as well as Parke-Hayden's request for punitive damages in connection with the First and Third Claims. For the following reasons, Parke-Hayden's motion is denied; Loews's motion is granted.

The Parties

Parke-Hayden is a licensed real estate brokerage firm which is a New York corporation with its principal place of business at 98 Cutter Mill Road in Great Neck, New York.

Loews is a Delaware corporation with its principal place of business at 400 Plaza Drive in Secaucus, New Jersey. Through its subsidiary and affiliated corporations, Loews engages in the operation and management of movie theaters throughout the United States.

The Facts

This lawsuit arises out of two unconsummated real estate transactions to which Loews was a party and in which Parke-Hayden acted as broker. With regard to both transactions, Parke-Hayden seeks to recover brokerage commissions, as well as punitive damages, from Loews.

Appendix E

The 72nd Street Property

The First Claim of the Complaint, on which Parke-Hayden seeks summary judgment, involves property located at 72nd Street and Broadway in New York City (the "72nd Street Property") and negotiations by Loews to lease the 72nd Street Property and construct and operate a partially below-grade movie theater complex (the "72nd Street Transaction").

Sometime in early 1988, Hy Teich ("Teich"), the president of Parke-Hayden, brought the 72nd Street Property to the attention of Loews's employee, Gil Littman ("Littman"), Teich Dep. at 32, who had been hired by Loews in December 1987 to locate potential theater sites for Loews. Littman had started searching for a theater site in the neighborhood of West 72nd Street in early 1988. It is unclear which of the men approached the other: Littman testified that he asked Teich, a longtime friend, to find potential sites for Loews in that area, Littman Dep. at 20; Teich, on the other hand, testified that he "made someone aware . . . that we had this outrageous corner. Teich Dep. at 32. In any event, Teich showed Littman the Beacon Theater and the 72nd Street Property. *Id.* at 22.

According to Littman's testimony, when Teich showed him the 72nd Street Property, Littman said "Teich, we want the deal." *Id.* at 26. Lou Korman ("Korman"), who was at all relevant times chairman of Loews's parent, Columbia Pictures Entertainment, Inc. ("Columbia"), told Littman to make the deal, and Littman called Teich and said "hey, we want the deal. Let's go." Littman Dep. at 27; *see also* Teich Dep. at 32 (Korman told Teich directly that "I'd like to get that property"). Teich conveyed Loews's interest to Philip Pilevsky ("Pilevsky"), a general partner of Broadway-72 Associates (the "Owner"), the owner of the 72nd Street Property. Teich reported back to Littman that Pilevsky was

not interested in a transaction with Loews for that property Littman insisted that Teich continue trying to get the 72nd Street Property. When Littman informed Korman that Pilevsky would not do the deal, Korman said that he did not care "what it takes. Make the deal. Get 72nd Street. Get Teich and make the deal." *Id.* at 27, 30. Littman thereafter had "Teich continue to work for [Loews] to get the deal" by calling him at all hours of the day and night "to make sure he understood that I wanted it." *Id; see also* Teich Dep. at 34 (Littman told Teich to "try to get it. Try to get it.").

In his affidavit, Pilevsky states that he never asked Teich to seek a lessee for the 72nd Street Property and did not have the property listed with any broker, Pilevsky Aff. ¶ 3, and that when Teich approached him, he told Teich that he did not want to lease the property to Loews. *Id.* Subsequently, according to Pilevsky, Teich repeatedly asked him to agree to Loews's proposal. Finally, Teich persuaded Pilevsky to enter into negotiations with Loews. *Id.* ¶ 4.

Negotiations took place over approximately the next two years. During the negotiations, according to Pilevsky, Teich would often ask him to agree to points desired by Loews, and, "as a result of his efforts, agreements were reached." *Id.* ¶ 5. Indeed, Teich's role in this regard is confirmed by former Loews President and Chief Operating Officer, Jerry Esbin ("Esbin"). Esbin testified that "[h]e [Teich] would convey various things that I [Esbin] wanted to Mr. Pilevsky." Esbin Dep. at 26. The purpose of his conveying such information was "to allow [Loews] to ultimately get the deal that [Loews] wanted." *Id.* at 28. According to Littman's deposition testimony, if anything came up with respect to the 72nd Street Transaction Esbin would say "get to Teich. Let's say some business point came up that bothered Jerry, or something. He said, get Teich and have him take care of this with Phil [Pilevsky]." Littman Dep.

at 32. At the same time, Esbin's testimony clearly establishes that he regarded and understood Teich to be acting as broker for the Owner. *See, e.g,* Esbin Dep. at 27.

By about March 1990, Loews and the Owner reached agreement on term, rent, taxes, construction of the theater, options for additional years, air rights, changes in zoning and mortgages. Esbin Dep. at 31. Esbin testified that at that point he told Mr. Teich that there would be a deal based on everything negotiated to that point, namely, the "economic points." Esbin Dep. at 55. Esbin testified that at the time the economic points were negotiated, Loews did not take into consideration the possible results of asbestos tests or rock borings. *Id.* at 58.

After negotiations and many drafts of a lease, a "final lease" was prepared and agreed to by both parties, which, according to Parke-Hayden, was ready for execution. Pilevsky Aff. ¶ 9, Ex. A. This lease agreement, like the drafts before it, provided that Parke-Hayden was the sole broker or finder and that the Owner would pay Parke-Hayden its brokerage commission for the lease transaction. Pilevsky Aff. Ex. A ¶ 35.01. After they worked out the rent, Esbin told Teich that "with respect to those points that we have discussed the economic points, up to that point, . . . everything was satisfactory to me and there would be a deal based on everything at that point." Esbin Dep. at 55.

Nevertheless, as Esbin testified, all of the points had not yet been negotiated at that time. Esbin Dep. at 54-55. Because the theater complex was to be partially below-grade, demolition of the existing building and construction of a new facility would be necessary. Loews contends that it had always conditioned its signing of the lease upon satisfactory results from soil and environmental tests at the 72nd Street Property. Thus, according to

Loews, as of April 1990, the "critical point concerning the expense of excavating bedrock and removing asbestos from the property had yet to be negotiated." Loews Memo. in Opp. at 7. Loews claims that this condition was known to both Teich and the Owner as early as January 1990 when the parties began negotiating a formal agreement for Loews to conduct the tests (the "Access Agreement"). Teich, on the other hand, testified that it was his understanding that the test results had no bearing on the parties' obligation to go forward on the deal that Teich Dep. at 118-19.

The physical due diligence revealed the presence of rock and asbestos. The estimated cost of excavation would increase the cost of the project by $800,000 to $1,000,000. Esbin informed Pilevsky that he was concerned about bearing the one-million dollar cost of excavation and asbestos removal and inquired about possible concessions from the Owner. According to Pilevsky, he "immediately agreed to work that out with him. . . . The possible cost of the rock excavation was not a stumbling block and would not have hindered our closing this deal." Pilevsky Aff. ¶ 16; *see also* Esbin Dep. at 96. However, according to Loews, it determined that it could not accept the risk and expense involved in blasting the rock at the 72nd Street Property and decided not to go through with the transaction. *See* Benjamin 1/6/92 Aff. ¶ 3.

Meanwhile, in or about September 1989, Columbia had been taken over by Sony Corp., at which time Korman exited as Columbia's chief executive officer and Peter Guber ("Guber") and Jon Peters ("Peters") took the helm. Sometime in the end of April or beginning of May 1990, Guber and Peters replaced Bernie Myerson with Alan Friedberg ("Friedberg") as Loews's Chairman. Esbin was relieved of his position in May 1990. It is undisputed that Loews's new management terminated the 72nd Street Transaction and made no attempt to close a lease with the Owner.

Appendix E

The Danbury Transaction

The Third and Fourth Claims of the Complaint, which Loews seeks to have dismissed on summary judgment, relate to a proposed joint venture agreement between Loews and real estate developers Pilevsky and David Lavipour ("Lavipour"), who formed an entity known as PL Danbury Cinemas Associates ("PL Associates"). The purpose of the proposed joint venture was to construct and operate a motion picture cinema at a site in Danbury, Connecticut (the "Danbury Transaction"). According to Parke-Hayden, Tech was retained by the proposed joint venture as a broker to facilitate the transaction. This assertion is not disputed on this motion.

Negotiations took place beginning in the spring of 1989. Loews was, and in fact continues to be, subject to a 1952 consent judgment (the "Consent Judgment") under which it is enjoined "from acquiring or continuing to own any beneficial interest in any motion picture theatre in conjunction with an actual or potential independent exhibitor." Smith 12/6/91 Aff. Ex. B, art. III, ¶ 5(b). Each draft of the proposed partnership agreement contained a clause referring to the Consent Judgment and providing that the proposed partners would not do anything to cause Loews to be in violation of the Consent Judgment. *See, e.g., id.* Ex. C, at 22-23, 44-45, 46-47.

In early 1990, Loews learned that Lavipour and Pilevsky had interests in other motion picture theaters, whereupon Loews informed all of the parties that it needed to obtain Department of Justice ("DOJ") approval for the proposed transaction. In February 1990, Loews contacted its antitrust counsel, Allen Kezsbom of Fried, Frank, Harris, Shriver & Jacobson to request that he obtain an opinion from the DOJ that the Danbury Transaction would not

constitute a violation of the Consent Judgment. On March 6, 1990, Kezbom sent a letter to Frederick Haynes of the Antitrust Division of the DOJ outlining why the proposed Danbury Transaction did not violate the Consent Judgment. Kezbom subsequently forwarded to the DOJ the proposed partnership agreement and the agreements documenting the theater interests of Lavipour and Pilevsky. On April 26,1990, Kezbom sent Haynes another letter summarizing relevant case law.

Nevertheless, Seymour Smith, who at all relevant times was Executive Vice President and General Counsel for Loews, affirms that in late September 1990, Haynes informed him and Kezsbom at a meeting at the DOJ that the DOJ would consider the consummation of the Danbury Transaction a violation of the Consent Judgment. Smith 12/6/92 Aff. 1128. On October 9, 1990, Kezsbom confirmed that Haynes had repeated this view to him. *Id.* Ex. F. Loews informed the other parties of the DOJ determination in early October 1990. Loews contends that, in view of this determination, it abandoned the Danbury Transaction. Parke-Hayden argues, on the other hand, that Loews had terminated the deal long before the DOJ determination for reasons other than any prohibitions imposed by the Consent Judgment.

Discussion

I. Standard for Summary Judgment

The standard for summary judgment is well-known. As the Second Circuit has recently written:

> Summary judgment may be granted only when there is no genuine issue of material fact remaining for trial and the moving party is

> entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "As a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party."

Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir.1991) (citations omitted). The court will find that there is no genuine issue of material fact and may therefore grant summary judgment where, "[v]iewing the evidence produced in the light most favorable to the nonmovant, . . . a rational trier could not find for the nonmovant." *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 191 (2d Cir.1991); *see also Bay*, 936 F.2d at 116.

II. Parke Hayden's Motion for Summary Judgment

The First Claim of the Complaint, on which Parke-Hayden moves for summary judgment, relates to the 72nd Street Transaction. Parke-Hayden alleges that Loews employed Parke-Hayden to procure a lease of the 72nd Street Property on its behalf, that Loews wrongfully refused to enter into the lease procured by Parke-Hayden, and that Loews is liable to Parke-Hayden in the amount of the brokerage commission Parke-Hayden would have received from the owner if not for Loews's wrongful conduct. Loews challenges Parke-Hayden's characterization of its relationship with Loews, contending that at no time did it employ Parke-Hayden as broker, that Parke Hayden was employed as Pilevsky's broker and that Loews regarded Teich as a "conduit" who was "nothing more than Pilevsky's agent and Loews' 'contact' with Pilevsky and his organization." Smith 1/6/92 Aff. ¶¶ 12-14.

Appendix E

It is undisputed that all parties interested in the 72nd Street Transaction contem plated that the Owner would pay Parke-Hayden's commission, as memorialized in each draft of the proposed lease agreement, *see, e.g.,* Smith 12/6/91 Aff. Ex. A, ¶ 35.01. Moreover, Parke-Hayden concedes that it has never alleged or sought to prove any agreement by Loews to pay commission to Parke-Hayden in connection with the 72nd Street Transaction. Parke-Hayden Reply Memo. at 9.

Under New York law,

> Where there is a contract of employment between the purchaser and the broker which does not expressly exclude the broker's right to commission unless the purchaser actually enters into a contract of sale, the purchaser's refusal to contract with a seller willing to contract on the purchaser's terms makes the purchaser liable to the broker for the commission the broker would have received from the seller.
>
> This liability is predicated upon the proposition that when the prospective purchaser knows that the broker will earn a commission from the seller, the law will imply a promise on the part of the prospective purchaser to complete the transaction, and if he fails or refuses to do so without a valid reason, the prospective purchaser becomes liable to the broker for breach of an implied promise, with damages chargeable to him measured by the amount of commission the broker would have earned.

Appendix E

Tulp v. Padula, 70 Misc.2d 306, 308, 333 N.Y.S.2d 3, 6 (Civ.Ct.1972); *see Westhill Exports, Ltd. v. Pope,* 12 N.Y.2d 491, 496, 240 N.Y.S.2d 961, 964, 191 N.E.2d 447, 449 (1963); *Schaecter v. Regency Props, Inc,* 115 A.D.2d 981, 981, 497 N.Y.S.2d 793, 794 (4th Dep't 1985); *Duross Co. v. Evans,* 22 A.D.2d 573, 574, 257 N.Y.S.2d 674, 676 (1st Dep't 1965); *Pease & Elliman, Inc. v. Gladwin Realty Co.,* 216 A.D. 421, 424, 215 N.Y.S. 346 (1st Dep't 1926); *McKnight v. McGuire,* 117 Misc. 306, 308, 191 N.Y.S. 323 (Sup.Ct.1921).

In New York, absent an agreement to the contrary, a real estate broker earns his commission when he procures a buyer who is ready, willing and able to purchase at the terms set by the seller. *Lane—Real Estate Dep't Store, Inc. v. Lawlet Corp.,* 28 N.Y.2d 36, 42, 319 N.Y.S.2d 836, 840, 268 N.E.2d 635, 638 (1971); *Kalmon Dolgin Affiliates, Inc. v. Estate of Nutman,* 172 A.D.2d 917, 568 N.Y.S.2d 204 (3d Dep't 1991).

For the broker to prevail therefore, it must be shown that the purchaser employed the broker, that the broker procured a seller who was ready willing and able to enter the proposed transaction, and that the failure to complete the transaction was due to the fault of the purchaser. The burden of proof is borne by the broker, in this case Parke-Hayden. *Tulp,* 70 Misc.2d at 308, 333 N.Y.S.2d at 6 (citing cases).

The mere fact that Parke-Hayden was to receive its commission from, and thus was employed by, the Owner, does not prevent it from also being employed by Loews. *See Grossman v. Herman,* 266 N.Y. 249, 251-52, 194 N.E. 694 (1935); *Long Island Bus. Exch., Inc. v. De Luca,* 58 A.D.2d 594, 594, 395 N.Y.S.2d 244, 246 (2d Dep't 1977); *Simon v. Allied Chem. Corp.,* 35 A.D.2d 273, 275, 315 N.Y.S.2d 919, 922 (1st Dep't 1970), *aff'd,* 29 N.Y.2d 861,

328 N.Y.S.2d 169, 278 N.E.2d 340 (1971); *Pease & Elliman,* 216 A.D. at 423, 215 N.Y.S. at 423 (quoting *McKnight,* 117 Misc. at 308, 191 N.Y.S. 323).

Rather, the question is whether the facts may be held as matter of law to justify an inference of a double employment. *Grossman,* 266 N.Y. at 252, 194 N.E. 694. There must be a contract between Loews and Parke-Hayden which Loews has broken with resulting liability for damages. *Id.*

> "[T]he contract of employment may be established . . . by facts showing, in the absence of an express agreement, a conscious appropriation of the labors of the broker . . . in some cases 'by the mere acceptance of the labors of the broker.' "

Gronich v. 649 Broadway Equities Co., 169 A.D.2d 600, 565 N.Y.S.2d 18 (1st Dep't 1991) (quoting *Sibbald v. Bethlehem Iron Co.,* 83 N.Y. 378, 380-81 (1881)).

The affidavits and deposition testimony cited above leave no doubt that, under relevant New York law, Loews employed Teich to procure a lease of the 72nd Street Property by soliciting and accepting his services on Loews's behalf.[1] *See Tulp,* 70 Misc.2d at 309, 333 N.Y.S.2d at 7 (plaintiff-broker was "employed" by

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1. The record contains evidence additional to that reviewed in the discussion of facts that establish that Teich was performing services on behalf of Loews in the 72nd Street Transaction. *See, e.g.,* Esbin Dep. at 25-28 (Teich was "performing services for Loews in this regard [helping Loews get the site from Pilevsky]" and Esbin understood Teich to be working for him "to the extent that he would convey what I needed to Mr. Pilevsky" for the purpose of getting the deal Loews wanted).

defendants prospective purchasers of a one-family home — who had "requested" that plaintiff show them one-family houses in a certain price range in a certain area).

The problem on this motion for summary judgment, however, is that the record is bare of evidence of the terms of that employment other than Teich's testimony that "[m]y obligation was to try to bring — my obligation was to try to have Phil Pilevsky and his partners lease that parcel of property. My obligation to Loews was to negotiate *a palatable deal* once the plans were acceptable to both parties." *Id.* at 52-53 (emphasis added). This description of the terms is simply too indeterminate to form a basis upon which to conclude on a motion for summary judgment that Loews breached the purported agreement or "contract" with Parke-Hayden.[2]

Moreover, questions of fact exist as to whether Parke-Hayden procured a "ready, willing and able lessor" on the terms proposed by the Loews. Very specifically, the factual submissions raise a question as to whether a favorable result from the rock and

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2. This case should be contrasted to *McKnight v. McGuire*, 117 Misc. 306, 191 N.Y.S. 323 (Sup.Ct. 1921), in which the court held the lessee liable to the broker for breaching his agreement with the broker to enter into a lease agreement. In that case, the lessee had employed the broker to submit an offer to the owner of the premises, had agreed to lease the premises if the broker could obtain specific terms (which the broker ultimately did), and knew that the broker anticipated receiving a commission from the owner. *Id.* at 307-09, 191 N.Y.S. 323; *see also Westhill Exports*, 12 N.Y.2d at 494, 240 N.Y.S.2d at 962-63, 191 N.E.2d at 448 (broker authorized to negotiate for *paper supply* contract; price, term, quantity and quality terms of desired contract specified); *Julien J. Studley, Inc. v. New York News, Inc.*, 122 A.D.2d 633, 635, 505 N.Y.S.2d 419, 420 (1st Dep't 1986) (no implied-in-fact contract where defendant-seller never specified asking price), *aff'd*, 70 N.Y.2d 628, 518 N.Y.S.2d 779, 512 N.E.2d 300 (1987).

asbestos tests was a condition to Loews concluding the 72nd Street Transaction which the Owner failed to meet.

Loews maintains that it had always made clear, both to Teich and Pilevsky, that favorable results from soil and environmental tests were a condition to Loews signing a final lease, while Teich testified that this was not his understanding.[3] The bulk of Loews's "evidence" of this condition or of the other parties' awareness thereof is either conclusory,[4] or fails to speak to whether the Owner or Teich were aware that these tests and/or favorable results were a condition to be met or a term to be negotiated before Loews would sign a lease.[5]

Of a more substantial nature, is Smith's affirmation regarding a January 11, 1990 meeting at Pilevsky's office at which the 72nd Street Transaction was discussed. Among those present were Smith, Pilevsky, Esbin and Teich. According to Smith, Loews's need for asbestos and subsoil testing was discussed along with other lease terms and "Pilevsky promised that *before any documents would be signed,* he would furnish Loews with a copy

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3. Teich testified that rent and air rights were a topic of hot negotiation. Teich Dep. at 44-46. Unfortunately, the pages of the Teich deposition transcript which presumably contain Teich's response when asked what other issues were subject to negotiation have been omitted. Parke-Hayden Notice of Motion, Teich Dep. at 46-?.

4. *See, e.g.*, Smith 1/6/92 Aff. ¶¶ 16-19 ("This fact [that favorable results was a condition] was no secret to Pilevsky or Teich. In fact, Loews' intentions in this regard were made known to Pilevsky and Teich as early as January of 1990. . . ."); *id.* at 21 ("As both Pilevsky and plaintiff were well aware, that [determining whether Loews shouldenter into the lease] was the precise purpose of conducting these due diligence environmental tests *before* Loews would sign the lease." (emphasis in original)).

5. *See, e.g.*, Smith 1/6/92 Aff. ¶ 19, stating merely that "the *importance* of the soil and environmental tests was continuously reiterated." (emphasis added).

of an asbestos report he had prepared." Smith 1/6/92 Aff. ¶ 16 (emphasis in original). Furthermore, in a March 23, 1990 letter to Pilevsky's attorney, David Badain, Deputy General Counsel to Loews, requested execution of the Letter of Agreement for Loews to conduct its physical due diligence "as soon as possible so that we can commence our physical due diligence *and facilitate the execution of the Lease.*" Danzig 1/6/92 Aff. Ex. G (emphasis added). Finally, Esbin testified that Loews's lawyers conveyed to the landlord's lawyers that Loews wanted to do the asbestos test and the rock boring, Esbin Dep. at 58, that there were discussions "amongst ourselves only at Loews" that the "economic points" upon which all had agreed were contingent on the results of the asbestos and boring tests, and that he was "not sure" whether he told Teich that the results of the tests were a contingency to entering into the lease. Esbin Dep. at 78-79.

Drawing all inferences and resolving all ambiguities in favor of Loews, there is a material factual dispute as to whether a favorable result from the environmental tests was a term or condition unsatisfied by the Owner and thus as to whether Parke-Hayden procured for Loews a ready, willing and able lessor. *See Tulp,* 70 Misc.2d at 310, 333 N.Y.S.2d at 8 (plaintiff not entitled to commission where failed to prove he had procured seller ready, willing and able to sell on defendants' terms); *cf. Sanders A. Kahn, Assocs. v. Maidman,* 69 Misc.2d 90, 93, 329 N.Y.S.2d 121,124 (Sup. 1971) ("Where the owner merely specifies the purchase price of property, without fixing the other terms of sale, commissions are not earned until and unless the person produced by the broker reaches an agreement with the owner not only as to price but also as to the terms upon which the sale is to be made."), *aff'd,* 38 A.D.2d 798, 329 N.Y.S.2d 318 (1st Dep't), *aff'd,* 30 N.Y.2d 831, 335 N.Y.S.2d 77, 286 N.E.2d 462 (1972).

Parke-Hayden contends, nevertheless, that Loews is liable for its commission regardless of any unfulfilled condition because the failure of the condition was due to the bad faith repudiation of the deal as part of a house-cleaning by the Loews management team that took over in the late spring of 1990. Under New York law, regardless of unfulfilled terms or conditions, the party who employs the broker will be liable for the commission if he is responsible for the failure to perform the condition. *Nuvest, S.A. v. Gulf & Western Indus., Inc.*, 649 F.2d 943 (2d Cir.1981) (citing *Lane*, 28 N.Y.2d at 43, 319 N.Y.S.2d at 841, 268 N.E.2d at 639); *Collins Tuttle & Co. v. Ausnit*, 95 A.D.2d 668, 669, 463 N.Y.S.2d 219 (1st Dep't 1983) (" 'a defendant who is sued for a commission cannot be heard to complain where it was her own act which prevented the natural progress of the transaction' " (quoting *Trylon Realty Corp. v. Di Martini*, 40 A.D.2d 1029, 1030, 338 N.Y.S.2d 945 (2d Dep't 1972), *aff'd*, 34 N.Y.2d 899, 359 N.Y.S.2d 284, 316 N.E.2d 718 (1974)). In other words, if the sale is not consummated due to the bad faith, wrongful or arbitrary conduct by the party who retained the broker, that party may not avoid his liability to the broker under their agreement.[6]

While Parke-Hayden has presented evidence suggesting that the demise of the 72nd Street Transaction may have been due to the mere unwillingness of the new management team to proceed even on the terms to which all of the parties had already agreed,[7] there

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6. Loews contests the availability of this theory to Parke-Hayden in the first instance, claiming that it applies only where the party allegedly acting in bad faith employed the broker. As discussed above, Parke-Hayden was employed by Loews.

7. Esbin and Pilevsky both testified that when Esbin approached Pilevsky about the potential added cost of the asbestos and rock excavation, Pilevsky indicated a willingness to negotiate concessions, stating that they would "work something out." Esbin Dep. at 95; Pilevsky Aff. ¶¶ 16-17 Nevertheless, this possibility was never

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are questions of fact as to whether the cost of the rock and asbestos removal was a genuine deal-stopper.[8] There is no proof, for instance, that Pilevsky indeed would have "worked out" issues regarding the cost of the removal within the terms undisputedly satisfactory to Loews. Because factual questions exist as to these issues, Parke-Hayden's motion for summary judgment on the First Claim is denied.

III. Loews's Motion for Partial Summary Judgment

A. *Motion to Dismiss Third and Fourth Claims Based on the Danbury Transaction*

The first half of Loews's motion for summary judgment seeks dismissal of the Third and Fourth Claims, in which Parke-Hayden claims lost brokerage commissions relating to the Danbury Transaction. Unlike the dispute relating to the 72nd Street Property, Loews does not contest Parke-Hayden's allegation that it was acting as Loews's broker in the Danbury Transaction. Rather, Loews contends that because the Consent Judgment prohibited the joint venture between Loews and PL Associates, Parke-Hayden did not secure ready, willing and able partners for the proposed joint venture. As such, Loews argues that Parke-Hayden is not

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pursued by Loews's new management, and the record establishes that it opted not to proceed with the deal because it was "financially unsound." Friedberg Aff. ¶¶ 2, 5-6. Thus, there is "testimony from which the jury could . . . conclude[ ] that [the Owner] might have met [Loews's] price term" if Loews had negotiated the concessions further. *Nuvest*, 649 F.2d at 949.

8. Kenneth Benjamin, a Vice President of Loews since May 1989, states in his affirmation that, as of April 1990, the discovery of rock posed a "major problem in going forward with the proposed transaction." Benjamin Aff. ¶ 3.

entitled to a commission as a matter of New York law. *See, e.g., Lane,* 28 N.Y.2d at 42, 319 N.Y.S.2d at 840, 268 N.E.2d at 639.

Parke-Hayden opposes Loews's motion contending first that Loews cannot raise the Consent Judgment as a shield because it was within Loews's power to have the prohibition lifted, enabling it to consummate the Danbury Transaction. Secondly, Parke-Hayden contends that the Consent Judgment was not the real reason for Loews's decision to back out of the deal.

There is no dispute concerning the awareness of the parties that compliance with the Consent Order was a term of the transaction. Each draft of the proposed partnership agreement contained provisions stating that PL Associates had been alerted to the existence of the Consent Judgment, had been advised that it prohibited Loews "from acquiring or continuing to own any beneficial interest in any motion picture theatre in conjunction with an actual or potential independent exhibitor," and had agreed "not to do or perform any act . . . which would cause Loews . . . to be in violation of said provision . . . ." *See* Smith 12/6/91 Aff. Ex. C, at 45-46. There is also no dispute that Loews sought an opinion from the DOJ as to whether the Danbury Transaction would violate the Consent Order and that the DOJ advised Loews in September 1990 that it would view the transaction as violative. Nevertheless, Parke-Hayden argues that Loews's motion should be denied, asserting that Loews could have had the Consent Judgment lifted but failed to take any steps to do so. *See* Parke-Hayden Memo. in Opp. at 5 ("Loews had but to ask the Department of Justice that it consent to the elimination of the decree.").

Parke-Hayden's assertion that the Consent Judgment would have been lifted had Loews made the effort is not supported by facts. Concededly, the DOJ did submit a memorandum in support

of Loews October 1990 motion to lift the decree. Nevertheless, even to this date, no evidence has been presented that that motion was successful. Thus, even if Loews had taken action during the pendency of negotiations with PL Associates, there is no factual basis for Parke-Hayden's facile contention that Loews would have been freed of the constraints imposed by the Consent Judgment. As things stood at the time of the negotiations, and indeed, as they still stand today, Loews was subject to the Consent Judgment which, according to the DOJ, prohibits a joint venture with PL Associates.

Moreover, even assuming that Loews could have had the Consent Judgment eradicated by merely lifting its finger, this is not material to the inquiry as to whether Parke-Hayden procured ready, willing and able partners under the terms of the proposed partnership. Loews never agreed, nor was it a condition of any agreement with PL Associates or Parke-Hayden, that Loews would make any efforts to have the Consent Judgment lifted. To the contrary, the proposed partnership agreements clearly contemplated the existence and survival of the Consent Judgment. Thus, this case is distinguishable from *Long Island Bus. Exch. v. De Luca,* 58 A.D.2d 594, 395 N.Y.S.2d 244 (2d Dep't 1977), invoked by Parke-Hayden. In that case, a condition of the proposed agreement was that the defendant would obtain a liquor license within eight weeks. Because the defendant allegedly failed to *apply* timely for the license, the court held that the plaintiff had stated a cause of action for its commission because the defendant allegedly acted deliberately to cause the transaction to founder. *Id.* at 594, 395 N.Y.S.2d at 245.

Parke-Hayden also claims that the Consent Judgment had nothing to do with the failure of the transaction because Loews terminated the transaction long before it received the DOJ's opinion in September 1990. Even assuming the truth of the

assertion that the Consent Judgment was not the primary *reason* for Loews's decision to terminate the transaction, the fact remains that the Consent Judgment existed at all times and legally prevented Loews from being "able" to participate in this joint venture.

Because the undisputed facts establish that Parke-Hayden failed to procure ready, willing and able partners for the Danbury joint venture, Loews's motion for summary judgment dismissing the Third and Fourth Claims is granted.

B. *Motion to Dismiss Parke-Hayden's Claim for Punitive Damages*

Loews also has moved for summary judgment dismissing Parke-Hayden's claim for punitive damages on the First and Third Claims.

As a preliminary matter, it bears noting that, even assuming Loews's bad faith, these claims sound in contract, not tort. *Pittston Warehouse Corp. v. American Motorists Ins. Co.*, 715 F.Supp. 1221, 1227 (S.D.N.Y.1989) ("tort of bad faith breach of contract" except in the insurance context), *aff'd* 954 F.2d 62 (2d Cir.1992). Under New York law, punitive damages generally are not available for a simple breach of contract. *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 371 (2d Cir.1988) (citing New York cases). New York courts, the Second Circuit and courts within this district are virtually unanimous that punitive damages may not be awarded in breach of contract cases, unless the wrong is aimed at the public generally. *Durham Indus., Inc. v. North River Ins. Co.*, 673 F.2d 37, 41 (2d Cir.), *cert. denied*, 459 U.S. 827, 103 S.Ct. 61, 74 L.Ed.2d 64 (1982); *Airlines Reporting Corp. v. Aero Voyagers, Inc.*, 721 F.Supp. 579, 585 (S.D.N.Y.1989) (punitive damages available in breach of contract actions where "fraud *'aimed at the public*

generally,' evincing a 'high degree of moral turpitude,' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations.' " (citation omitted; emphasis added)); *Morse/Diesel, Inc. v. Fidelity & Deposit Co.*, 716 F.Supp. 578 (S.D.N.Y. 1989) (punitive damages based on a contractual action cannot be sought absent some allegation of wrong against public generally); *Purdy v. Consumers Distrib.* Co., 648 F.Supp. 980, 983 (S.D.N.Y.1986) ("[P]unitive damages are not available unless the plaintiff can show that the conduct complained of was not an isolated private wrong, but rather a morally culpable course of conduct *aimed at injuring the public generally.*" (emphasis added)); *Jacobson v. New York Prop. Ins. Underwriting Assoc.*, 120 A.D.2d 433, 501 N.Y.S.2d 882 (1st Dep't 1986) (to state cause of action for punitive damages, pleader must assert " 'not an isolated transaction incident to an otherwise legitimate business, but a gross and wanton fraud *upon the public.*' " (emphasis added; quoting *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961)); *Samovar of Russia Jewelry Antique Corp. v. Generali*, 102 A.D.2d 279, 281, 476 N.Y.S.2d 869, 871 (1st Dep't 1984) (must be "morally reprehensible conduct *directed at the general public*" (emphasis added)).

Citing a handful of cases, Parke-Hayden argues that a wrong against the general public is not a required element of a claim for punitive damages in breach of contract actions in New York. However, the two cases that are arguably on point, *Williamson, Picket, Gross, Inc. v. Hirschfeld*, 92 A.D.2d 289, 460 N.Y.S.2d 36 (1st Dep't 1983) and *AML Int'l Ltd. v. Orion Pictures Corp.*, No. 89 Civ. 2048 (KMW), 1991 WL 120323, 1991 U.S.Dist.Lexis 842 (S.D.N.Y. June 21, 1991), run decidedly against the grain of prevailing New York law.[9]

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9. The other cases cited by Parke-Hayden are distinguishable in that they did not involve simple breaches of contract. *See Gordon v. Nationwide Mut. Ins. Co.*, 30

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Appendix E

In *Williamson, Picket,* an action for breach of a brokerage agreement, the First Department held that punitive damages may be awarded where — the defendant's conduct involves "that degree of bad faith evincing a 'disingenuous or dishonest failure to carry out a contract.' " 92 A.D.2d at 295, 460 N.Y.S.2d at 41 (quoting *Gordon v. Nationwide Mut. Ins. Co.,* 30 N.Y.2d 427, 437, 334 N.Y.S.2d 601, 285 N.E.2d 849 (1972)). However, the First Department appears to have abandoned the holding of *Williamson, Picket.* In *Jacobson v. New York Property Ins. Underwriting Ass'n.,* 120 A.D.2d 433, 501 N.Y.S.2d 882 (1986), the same court explicitly held three years later that punitive damages are available in breach of contract actions only if the allegations support a conclusion that a fraud "upon the public" is involved. *Id.* at 435, 501 N.Y.S.2d at 884. And, after engaging in a detailed analysis of New York law on this topic, a court within this district rejected the rule in *Williamson, Picket* as an "aberration" in the otherwise uniform law of New York. *Purdy,* 648 F.Supp. at 982-83; *cf. Morse/Diesel,* 715 F.Supp. at 588 (breach of contract action; rejecting application of *Greenspan v. Commercial Ins. Co.,* 57 A.D.2d 387, 395 N.Y.S.2d 519 (1977), which held that *Walker is* no longer valid in New York). Indeed, the *Williamson, Picket* court itself acknowledged the prevailing New York rule that " 'punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved.' " 92 A.D.2d at 294, 460 N.Y.S.2d at 40 (quoting *Garrity v. Lyle Stuart, Inc.,* 40 N.Y.2d 354, 358, 386 N.Y.S.2d 831, 833, 353 N.E.2d 793, 795 (1976)).

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N.Y.2d 427, 334 N.Y.S.2d 601, 285 N.E.2d 849 (1972) (insurance contract), *cert. denied,* 410 U.S. 931, 93 S.Ct. 1374, 35 L.Ed.2d 593 (1973); *Minjak Co.* v. *Randolph,* 140 A.D.2d 245, 528 N.Y.S.2d 554 (1st Dep't 1988) (breach of warranty of habitability).

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In the second case, *AML International,* Judge Wood recently denied a motion for summary judgment to strike plaintiff's demand for punitive damages in a breach of contract action. The court stated that "[u]nder New York law, punitive damages will be available only where defendant's conduct constitutes 'gross, wanton, or willful fraud or other morally culpable conduct.' " 1991 WL 120323 at 4, 1991 U.S.Dist.Lexis at 11 (quoting *Smith,* 861 F.2d at 371-72; *Borkowski v. Borkowski,* 39 N.Y.2d 982, 387 N.Y.S.2d 233, 355 N.E.2d 287 (1976)). Nevertheless, this definition of New York law must be read before the backdrop of Judge Wood's prior opinion in the same case in which she wrote:

> According to the law of New York, ... " 'punitive damages are not available for mere breach of contract' ... even if the breach results from a deliberate br,each of good faith." To award punitive damages, "[t]here must be fraud *'aimed at the public generally,'* evincing a 'high degree of moral turpitude,' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations.' "

AML Int'l Ltd. v. Orion Pictures Corp., No. 89 Civ. 2048 (KMW) 1990 WL 364469, slip op. at 2 (emphasis added). *AML* is further distinguishable in that it involved an allegation of a pattern of breached contracts against various parties.

Following prevailing New York law, therefore, Parke-Hayden may not claim punitive damages for Loews's alleged breach of contract in the 72nd Street and Danbury Transactions. Loews's motion for summary judgment dismissing such claims is granted.

Appendix E

Conclusion

For the foregoing reasons, Parke-Hayden's motion for an order granting summary judgment in its favor on the First Claim is denied. Loews's motion for summary judgment dismissing the Third and Fourth Claims, as well as Parke-Hayden's claim for punitive damages on the First and Third Claims is granted.

It is so ordered.

APPENDIX F — SPECIAL VERDICT FORM

Special Verdict Form

Parke-Hayden v. Loews

1. Did Parke-Hayden, Inc. ("Parke-Hayden") have an agreement with Broadway 72 Associates to be paid a brokerage commission by Broadway 72 Associates in connection with the execution of a lease to Loews Theater Management Corp. ("Loews") of a portion of the property owned by Broadway 72 Associates at Broadway and 72nd Street (the Lease)?

YES √ NO ____

If your answer is "YES," please go to question 2. If your answer is "NO," please go to the STOP instruction at the end of this form.

2. Was Broadway 72 Associates ready, willing, and able to enter into the Lease at the time of its execution?

YES √ NO ____

If your answer is "YES," please go onto question 3. If your answer is "NO," please go to the STOP instruction at the end of this form.

3. Did Loews have a valid reason not to proceed with the execution of the Lease?

YES ____ NO √

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If your answer is "YES," please go onto the STOP instruction at the end of this form. If your answer is "NO," please go to question 4.

4. Did Loews act in bad faith, wrongfully or arbitrarily in not proceeding with the negotiation of the Lease?

YES __√__ NO ____

If your answer is "YES," please go onto question 5. If your answer is "NO," please go to the STOP instruction at the end of this form.

5. What are the damages, if any, to which Parke-Hayden is entitled as a result of the conduct of Loews?

$ _____

STOP

Please have the foreperson sign the Special Verdict form and advise the Marshall that you have reached a verdict.

s/ Peter Gobbey
FOREPERSON